

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-000028

RECEIVED

JAN 19 2018

S.C. SUPREME COURT

Kadeem Johnson, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
SC Bar #77889

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT’S ISSUE PRESENTED3

STATEMENT OF THE CASE.....4

STATEMENT OF THE FACTS6

STANDARD OF REVIEW8

ARGUMENT

 Plea counsel was neither deficient nor prejudicial when
 representing to Petitioner the likely sentencing range he would
 receive upon pleading guilty, as his performance was within the
 bounds of professional norms and the record is devoid of evidence
 showing that, but for the alleged errors, Petitioner would have gone
 to trial.....10

CONCLUSION.....15

RESPONDENT'S ISSUE PRESENTED

Is there probative evidence in the record to support the post-conviction relief court's finding plea counsel provided effective assistance to Petitioner when he gave advice regarding his interpretation of the plea judge's comment about sentencing, but Petitioner received a lengthier sentence than anticipated?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was true bill indicted at the March 2011 term of the Sumter County Grand Jury under a three count indictment for attempted murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime (2011-GS-43-0481), as well as a two count indictment for armed robbery and possession of a weapon during the commission of a violent crime (2011-GS-43-0469). Subsequently, Petitioner was true bill indicted at the July 2011 term of the Sumter County Grand Jury for a third count of armed robbery (2011-GS-43-0939). Charles T. Brooks, III, Esquire represented Petitioner. On April 17, 2012, Petitioner pled guilty before the Honorable W. Jeffrey Young. Judge Young sentenced Petitioner to a twenty-five year term of imprisonment for armed robbery (2011-GS-43-0939), a twenty year term of imprisonment for attempted armed robbery (2011-GS-43-0481), a twenty year term of imprisonment for attempted murder, a five year term of imprisonment for possession of a weapon during the commission of a violent crime (2011-GS-43-0481), a twenty five year term for armed robbery (2011-GS-43-0469), and a five year term of imprisonment for possession of a weapon during the commission of a violent crime (2011-GS-43-0469). All sentences were to run concurrently.

A timely notice of appeal was filed and an Anders¹ brief was submitted on Petitioner's behalf by Robert M. Pachak, Esquire, of the South Carolina Commission of Indigent Defense - Office of Appellate Defense, on March 18, 2013. App. p. 65-76. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Kadeem Johnson, Op. No. 13-UP-331 (Ct. App. filed July 31, 2013). The remittitur was issued on August 23, 2013.

Petitioner filed his application Post-Conviction Relief ("PCR") on April 25, 2014. App.

¹ Anders v. California, 386 U.S. 738 (1967).

174-83. The State made its return on February 2, 2016. App. 80-86. Respondent filed its return on or about August 28, 2014. App. p.87-93. Petitioner filed an amended application on or about February 10, 2016, to which Respondent did not file a response. App. p.94-96. An evidentiary hearing was convened regarding this matter on March 13, 2016 at the Sumter County Judicial Center. Petitioner was represented by Tricia Blanchette, Esquire, and Respondent was represented by Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office. App. p.97-238.

Testimony was provided by Petitioner and Charles T. Brooks, III, Esquire ("plea counsel"). At the close of testimony, argument was heard from the attorneys regarding whether plea counsel provided Petitioner with a definitive amount regarding the number of years he was likely to receive during sentencing after a guilty plea. The attorneys and the court could not reach a consensus as to what the testimony revealed, and the court ordered Respondent to request the transcript of the testimony of the witnesses to be used in preparation of briefs on this issue.

Each party filed a brief in support of their position after receiving the transcript. App. p.313-330. By order signed October 18, 2016, Judge Goldsmith denied Petitioner's PCR. App. 289-306. PCR counsel filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCPC, on November 1, 2016. App. p.307-312. A return to the motion was filed by Respondent on November 21, 2016. Judge Goldsmith denied the motion by order dated November 28, 2016. App. p.331.

A timely notice of intent to appeal was served on January 9, 2017.² Appellate Defender Susan B. Hackett, Esquire, of the Office of Appellate Defense, filed a petition for writ of certiorari on September 5, 2017. This return follows.

² Petitioner's notice of appeal states that PCR counsel received notice of the order on December 12, 2016.

STATEMENT OF FACTS

On June 9, 2010, Petitioner and his first cousin, Kareem Upchurch, decided to rob a convenience store. They began by surveilling the El Cheapo's store at 949 Main Street, Sumter, South Carolina. They waited until there were only employees present before entering the store, at which time they stole approximately \$300. An employee and witness, Felicia Moses, was told to get on the floor or they would shoot, and was prepared to testify at trial that she saw guns. She called law enforcement, who could not successfully download the security, but were able to prepare still photos of two black males. One of these individuals was wearing a jacket with a unique emblem on the back, and both were wearing hoods and masks. These facts were the basis for the indictment ending in 469. App. p.37;21-38;24.

Upon information and belief, the men returned to their grandmother's house to divide the money. On June 10, 2010 a little after twelve³, the men entered a service station at 4756 Broad Street Extension in Sumter, South Carolina. Again, they waited until no customers were present before they went inside. The employee, Basem Muhammed, known as "Sam," attempted to defend the store. Both co-defendants fired shots, and Sam was hit several times, but survived, being left with at least one bullet in his body. Nothing was stolen from this encounter, but it led to the attempted robbery, attempted murder, and possession of a weapon charges of the indictment ending in 481. App. p.38;24-40;11.

The next night or early hours of the morning of June 11, 2010, the same two men decided to rob the Young's store on Peach Orchard Road, Sumter, South Carolina. They parked at a Pizza Hut across the street in the same vehicle they had used at the previous crimes – their grandmother's van. A third victim, Ms. Dinkins, saw both of them coming in. Video shows

³ It is unclear from the record whether this was noon or midnight though, from the timing of the other incidents, Respondent believes it was midnight.

Petitioner placing the gun to her head, and his co-defendant obtained the cash drawer Ms. Dinkins had taken out. The whole time, Ms. Dinkins begged them not to shoot as she was 5 ½ months pregnant at the time. App. p.40;11-41;16.

After reviewing all surveillance videos, law enforcement realized they were dealing with the same perpetrators at all three crime scenes. Investigators spoke with a man named Randy Lowery who was familiar with Petitioner's co-defendant, Mr. Upchurch. Mr. Lowery reported that Mr. Upchurch informed him that he had committed the crimes with his cousin, but Mr. Lowery was hesitant to get involved further. App. p.41;22-42;9.

Warrants were issued, and investigators and Marshals began searching for Petitioner. He was found near his grandmother's house with two men, Brady Higgins and Michael Gordon. Initially, everyone was arrested due to the presence of marijuana. However, Mr. Higgins reported that Petitioner told him he had recently "done some bops," which is a street term for committing robberies, and planned to save enough money to buy a vehicle and spend time in Florida "until the heat died down." App. p.42;10-25.

Mr. Upchurch, as Petitioner's co-defendant, entered a plea as Petitioner was preparing for trial. At the plea hearing, Petitioner admitted to all crimes. Judge Young stated that he sentenced Petitioner to concurrent terms when he would have ordinarily sentenced him to consecutive terms if found guilty at trial. He also found that Petitioner would have remained defiant to the end if his co-defendant had not pleaded guilty. He stated that, "These gentlemen just went on a crime spree. They were a two man terror on Sumter County and for that he did not plea until the end." Regarding sentencing, "he's certainly not going to get what I gave his cousin." App. p.57;23-58;2.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief 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, 363 S.C. at 368, 610 S.E.2d at 814). In a PCR action, the petitioner has 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 show 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.” Id. at 441, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

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. The question is whether counsel “provided representation within the range of competence required” in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court

presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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).

In order to warrant a new trial after a guilty plea, an applicant must prove that (1) counsel's performance was deficient and (2) there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty. Johnson v. Catoe, 336 S.C. 354, 520 S.E.2d 617 (1999); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997).

ARGUMENT

Plea counsel was neither deficient nor prejudicial when representing to Petitioner the likely sentencing range he would receive upon pleading guilty, as his performance was within the bounds of professional norms and the record is devoid of evidence showing that, but for the alleged errors, Petitioner would have gone to trial.

Petitioner contends the post-conviction relief court erred in denying him relief on his allegation that plea counsel was ineffective in advising him of his likely sentence were he to plead guilty. Petitioner maintains that he was induced to plead guilty by this advice that was formulated after a chambers conference, the contents of which was not placed on the record. He finally maintains that this advice and alleged inducement is a violation of his constitutional rights such that post-conviction relief is warranted. To the contrary, Petitioner received accurate advice of counsel from a competent practitioner operating well within professional norms. In the case at bar, plea counsel was not ineffective when he provided advice to Petitioner regarding his understanding of the plea judge's comments on sentencing. Plea counsel did precisely what he was hired to do – take all information at hand regarding Petitioner's case and provide the best advice possible to his client. The PCR court properly denied relief to Petitioner, and this decision should be affirmed.

Petitioner asserts that “the uncontroverted evidence presented in the lower court prove Petitioner received inaccurate advice from plea counsel concerning the sentence he would receive.” Petition, p.19. To call plea counsel's advice “inaccurate” is a stretch of the meaning of the word – plea counsel provided correct advice as to his understanding of the judge's words in chambers. He interpreted the phrase “not much worse” than the co-defendant's fifteen year sentence to mean a range of sixteen to twenty years. This is certainly within the range of

possibility, as is the actual sentence of twenty-five years, when the potential exposure was 120 years.

It is further uncontroverted that, though the discussion in chambers was not put on the record, the exact words reported to Petitioner by plea counsel were stated by the plea judge on the record: "I understand that his cousin did it and he's certainly not going to get what I gave his cousin but I am going to run them consecutive... Excuse me, concurrent." App. p.57;25-58;5. This immediately preceded the pronouncement of the sentence. Though this was not presented to Petitioner in time to influence his decision of whether to continue with trial, it was confirmation of what plea counsel heard and relayed.

Plea counsel never represented to Petitioner that the plea judge had given him a range of years, only what he interpreted by the plea judge's comments. Petitioner had every reason to rely on the information provided by plea counsel, as it was well within the range of professional norms. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland at 688). Petitioner testified at the evidentiary hearing that he believed his attorney was unprepared, and which induced him to plead guilty. Respondent avers this belief stemmed from information that plea counsel received immediately prior trial, namely that Petitioner's co-defendant had pleaded guilty. Plea counsel testified this information changed the posture of the case significantly: "...I said, 'Kadeem, your cases – the dynamics of your case have changed drastically. They had no case against you. Now they only – they got your codefendant cousin, which means now they got a strong case against you.'" App. 179;14-18. Indeed, this would shift the momentum of a case as it was beginning trial. Plea counsel further testified he was shocked at the sentence, which led him to file the motion for reconsideration that was ultimately denied. App. p.61-63.

Plea counsel's actions and advice were not deficient in any manner. He provided reasonable advice to his client based on his experience in criminal court and with that judge. Though he did not put the language of the chambers conference on the record during the plea hearing, he could have only stated what the judge repeated on the record – that he would not sentence him “much worse” than his co-defendant – because no number of years was given. Plea counsel made a reasonable interpretation that he then relayed to his client.

Plea counsel's actions and advice were correct and reasonable. It is often the case where a co-defendant who pleads guilty first gets the better sentence, and that happened in this case. There is no evidence, however, that Petitioner was prejudiced by plea counsel's advice and interpretation regarding the judge's language on sentencing. The record is devoid of any evidence stating Petitioner would have gone to trial but for plea counsel's reasonable but ultimately incorrect interpretation of the judge's language. The closest is that he testified it was a factor in him deciding to plead, but the record is replete with potential factors that could lead an individual to plead guilty. App. p.143;19-23. In fact, plea counsel testified that he informed Petitioner that the plea judge was likely to “load him up” on time to serve if he were convicted at trial, as that was the judge's typical practice. App. p.212;15-213;4.

The cases to which Petitioner cites all have very distinct instances of defense counsel providing affirmative misadvice that could have been researched and corrected. For example, in Hinson, defense counsel made a false and incorrect differentiation between common law murder and statutory murder that influenced Hinson's decision to plead. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). In Ray, defense counsel again provided incorrect information regarding maximum sentences that could have been prevented if defense counsel were better informed regarding the Omnibus Crime Act. Ray v. State, 303 S.C. 374, 401 S.E.2d (1991). Lastly, in

Alexander, the defendant was again given improper advice, this time because of the interplay between his charges and their contained greater and lesser offenses. Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). None of these relate to the case at hand where defense counsel was accurate and knowledgeable as to what the sentencing range was for Petitioner. Therefore, no deficiency can be found, thus failing to satisfy the first prong of Strickland.

When analyzing the prejudice prong, Petitioner looks to the same three cases cited above – Hinson, Ray, and Alexander – all of which have much stronger evidence of misadvice by counsel, as well as stronger evidence of the issue in controversy directly influencing the defendant's decision to plead. Petitioner aptly cites to Hill v. Lockhart, 474 U.S. 52, 56 (1985), for the proposition that "[t]he longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." That is undoubtedly the situation here – Petitioner weighed all options, evidence, and possibilities before deciding to plead guilty. Plea counsel's interpretation of the plea judge's discussion may have influence it, but it was not the only deciding factor.

Respondent likens the case at bar to that of Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001), which also refers to Hinson, Ray, and Alexander. In Roscoe, Petitioner was convicted of kidnapping, armed robbery, and burglary in the first degree. After he filed a PCR, the armed robbery charge was remanded for resentencing, and other relief was denied. This was appealed to the South Carolina Supreme Court for determination as to whether Roscoe's pleas were rendered unknowing and involuntary due to the trial court's erroneous statement that the maximum sentence he could receive was 25, rather than 30 years. Id., 345 S.C. 20, 546 S.E.2d at 418-19. The Supreme Court found that Roscoe made no showing of prejudice in his case, as "[t]he record is devoid of evidence that, if Roscoe had known the maximum penalty for armed robbery was

30, rather than 25 years, he would not have pled guilty and would have insisted upon going to trial.” It contrasted that situation to the cases Petitioner cites by recognizing that, “In each of these cases, however, there was evidence supporting a finding that the defendant's plea was induced such that, but for the erroneous advice, the defendant would not have pled guilty but would have insisted on going to trial. Here, there is simply no such evidence.” Id. 345 S.C. at 21, 546 S.E.2d at 419. Just as in this case, Petitioner got five years’ more time than anticipated and, just as in this case, “there is simply no such evidence” that the estimate of a likely sentence induced Petitioner to plead. Rather, it is reasonable to read from the record that a totality of circumstances in the criminal matter led Petitioner to plead guilty in his own best interest.

Petitioner’s facts and argument simply do not meet the standard required by Johnson v. Catoe, supra, in its interpretation of Strickland to fit guilty pleas. There is no evidence to show that counsel’s performance was deficient or that, but for that deficiency, there is a reasonable probability that Petitioner would have pled guilty. For these reasons, Respondent respectfully requests that this petition be denied and dismissed.

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,

ALAN WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar No. 77889

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

19 January, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

The Honorable Brooks P. Goldsmith, Circuit Court Judge

KADEEM JOHNSON, #350533

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

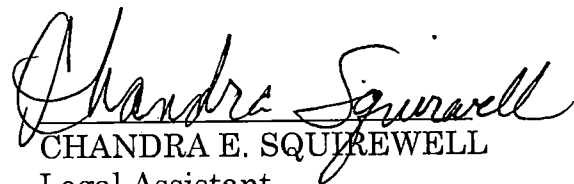
PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
PO Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 19th day of January 2018.


CHANDRA E. SQUIREWELL
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

January 19, 2018

RECEIVED

JAN 19 2018

S.C. SUPREME COURT

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

Re: Kadeem Johnson v. State of South Carolina
Appellate Case No. 2017-000028
Lower Court Case No. 2014-CP-43-0794

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Jessica E. Kinard
Assistant Attorney General
SC Bar #77889

JEK:ces
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services (letter only)