STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 12 2018
S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2017-000843

JEREMY CORDERA MOBLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
SC Bar # 101254

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S COUNTER QUESTIONS PRESENTED

I. Counsel was not ineffective in his advice concerning the recommended sentence where (1) Counsel told him the plea judge could go over the recommendation; (2) Petitioner was made aware through many sources that the State was merely recommending a cap of five years and the plea judge was not bound by the recommendation; (3) and Petitioner affirmed his understanding throughout the guilty plea proceeding.

II. *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991) was not violated because the successor PCR judge, John C. Hayes, III, did not preside over Petitioner's plea.

III. The PCR court's credibility findings are not reversible error as the successor PCR judge reviewed the entire lower court record and PCR hearing transcript before issuing his ruling, and these findings only affect the deference this Court gives on review.

STATEMENT OF THE CASE

Petitioner was charged with Hit and Run with Great Bodily Injury. Michael Matthews, Esquire, (hereinafter "Counsel") represented him. On November 19, 2013, Petitioner waived presentment to the grand jury and pled guilty as charged before the Honorable J. Mark Hayes, II. The State made a recommendation of a cap of five years' imprisonment, however the plea judge declined to accept the recommendation and sentenced Petitioner to imprisonment for ten years on the charge.

A notice of appeal was filed on Petitioner's behalf but the South Carolina Court of Appeals dismissed his appeal for failure to file a SCACR Rule 203 explanation. The Remittitur was issued on August 25, 2014.

Post-Conviction Relief Application

On October 6, 2014, Petitioner filed an application for post-conviction relief, alleging the following grounds for relief:

1. "Counsel, Mr. Michael Matthews failed to send all documents in time for appeal."
    a. "Letter from South Carolina Court of Appeals stating Counsel failed to comply with Rule 203(d)(l)(B)(iv) of the South Carolina Appellate Court Rules and my case was dismissed"
2. "Conflicting statements from me and codefendant"
3. "My attorney and solicitor agreed on a cap of 5 years"
    a. "I signed an agreement for a plea of a 5 year cap"
    b. "Attorney and solicitor had different statements in the case"

App. 29-30.

On or about January 14, 2015, the State filed a return. App. 35-38. On April 15, 2015, an

evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr., at the Moss Justice Center in York County. Leah B. Moody, Esquire, represented Petitioner at the PCR hearing. Assistant Attorney General J. Rutledge Johnson represented the State. After the hearing, but before an order was issued, Judge Kinard passed away. The cases still under advisement from that term of court were distributed to other Sixteenth Circuit judges. In each case, the successor judges were provided with the complete lower court record, all PCR pleadings, and the PCR hearing transcript. Petitioner's case was assigned to the Honorable John C. Hayes, III. Judge Hayes issued an order of dismissal signed March 16, 2017. Judge Hayes had before him a copy of the records of the York County Clerk of Court regarding the subject convictions, the plea affidavit form, Petitioner's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, the Return, and the PCR hearing transcript.

In the order of dismissal, the PCR court found Petitioner failed to prove that Counsel was ineffective regarding his guilty plea. App. 75. The PCR court found the record reflected Petitioner was informed of the sentencing range from the plea judge and the signed plea affidavit form, the recommended cap of five years, and the fact that the plea judge was not bound by the recommendation. App. 75-76. The PCR court also found Petitioner informed the plea court that no one had made any promises to get him to plead guilty. App. 76. Ultimately, the PCR court found Petitioner's plea was knowingly and voluntarily made, Counsel's advice was not deficient, and Petitioner was well aware to what he was pleading guilty and the sentence he faced.

A timely notice of intent to appeal was served on April 6, 2017. The Petition for Writ of Certiorari was submitted, dated September 25, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision 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). 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*, *supra.*

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, *supra.* The petitioner must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. First, the petitioner must prove counsel's performance was deficient. *Id.* Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the petitioner must show 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, 59 (1985).

ARGUMENT

I. Counsel was not ineffective in his advice concerning the recommended sentence where (1) Counsel told him the plea judge could go over the recommendation; (2) Petitioner was made aware through many sources that the State was merely recommending a cap of five years and the plea judge was not bound by the recommendation; (3) and Petitioner affirmed his understanding throughout the guilty plea proceeding.

Counsel provided effective assistance in his advice to Petitioner regarding the agreed-upon recommended sentence Petitioner faced at his guilty plea.

Plea Hearing

Prior to the plea hearing, Petitioner, Counsel, and Assistant Solicitor Ryan Newkirk signed a plea affidavit form that outlined the charges Petitioner faced and the plea agreement as agreed upon by both parties. See Supplemental Appendix 1. This form states Petitioner would plead guilty to hit and run with great bodily injury which carries a sentencing range of thirty days' to ten years' imprisonment. Supplemental Appendix 1. Petitioner initialed the section showing his type of plea was "guilty" pursuant to a "recommendation." Supplemental Appendix 1. Petitioner initialed the next section stating the State's recommendation was "Cap of 5 years with restitution." Supplemental Appendix 1. Petitioner further acknowledged no promises or threats induced his plea. Supplemental Appendix 1. Petitioner also acknowledged the solicitor was making a recommendation to the judge and Petitioner understood "the Judge is not required to accept the recommendation given by the Solicitor and the Judge may accept it, may go below the recommendation, or may go above the recommendation." Supplemental Appendix 2. Petitioner acknowledged he was not under the influence and he was waiving his constitutional trial rights. Supplemental Appendix 2-3. This form was signed and dated November 19, 2013 by Petitioner, Counsel, and Assistant Solicitor Ryan Newkirk. Supplemental Appendix 4-5. The plea judge signed the form upon accepting the plea. Supplemental Appendix 5.

At the outset of the guilty plea hearing, Assistant Solicitor Newkirk informed the plea judge Petitioner faced one count of hit and run with great bodily injury and the State was recommending a cap of five years. App. 3, ll. 5-11. The plea judge undertook the standard plea colloquy concerning Petitioner's background. App. 3-4. Petitioner stated no one had threatened him or made promises in order to make him plead guilty. App. 5, ll. 4-7. After the plea judge went over Petitioner's constitutional rights and Petitioner agreed with the State's version of the facts, the plea judge undertook the following colloquy:

> THE COURT: Now, sir, do you understand that **I'm not bound by recommendation** that's made by the state?
>
> PETITIONER: **Yes, sir.**
>
> THE COURT: And that today **I could sentence you up to 10 years** on this charge?
>
> PETITIONER: Yes, sir, **I understand.**
>
> THE COURT: And you still wish to enter this plea?
>
> PETITIONER: Yes, sir.
>
> THE COURT: Are you, in fact, guilty of this charge of hit-and-run involving an accident resulting in great bodily injury?
>
> PETITIONER: Yes, sir.

App. 9, ll. 4-15. (emphasis added).

The State and victims gave a presentation for sentencing, outlining the extreme condition that Petitioner left the victim in after the hit and run, which resulted in broken bones and a coma. App. 11-19. After the defense presented facts in mitigation, the plea judge accepted the plea as being made freely, voluntarily, knowingly, and intelligently. App. 24, ll. 11-15.

Despite the mitigation and the State's recommendation, the plea judge stated "[t]his is one of those rare occasions where I disagree with everyone in the courtroom." App. 24, ll. 23-24. The judge noted Petitioner was driving under suspension, possibly under the influence of illegal substances, and clearly violating his probation. App. 25, ll. 3-12. The plea judge stated he would

accept the recommendation to run the probation violation concurrent with the hit and run sentence, "but given [Petitioner's] prior history, the facts that are around how this accident happened, his prior two probationary cases, I have to impose the ten-year sentence." App. 25, ll. 13-17.

PCR Hearing

At the PCR hearing, Petitioner testified Counsel informed him he had negotiated plea offers with the State which resulted in a cap of five years. App. 44, ll. 10-14. Yet Petitioner admitted Counsel told him that despite there being a cap of five years, the judge "could go over it." App. 46, ll. 3-5. Petitioner testified he agreed at the plea hearing that the judge was not bound by the recommendation and he could receive a sentence up to ten years. App. 51, ll. 1-10. Petitioner testified he signed a plea affidavit prior to the guilty plea. App. 51, ll. 11-13. Petitioner acknowledged he signed next to the boxes marked for "guilty" and "recommendation" and the box for "negotiated" plea was not marked. App. 52. He further acknowledged the plea affidavit form stated the "State is recommending" a "cap of five with restitution." App. 52, ll. 21-22.

Counsel testified he and Petitioner went over the plea affidavit form prior to entering the plea. App. 56. He testified it is his practice to go over this form page by page, ask a client if they understand each paragraph, and explain the paragraph if a client says he does not understand something. App. 57-58. He testified that in his experience a judge will typically not go over a sentence cap, and believed in this case that Judge Hayes typically gave light sentences and would probably not go over five years since the State was not asking for more. App. 61-62. Counsel testified the judge disagreed with both parties and decided to sentence Petitioner to ten years. App. 63. Counsel testified he was in shock because that situation had never happened to him before. App. 64, ll. 4-5.

Deficiency

The PCR court correctly found Counsel's performance was not deficient because the record is completely clear that Counsel and the State agreed to a recommended sentence as part of the plea deal. There is certainly evidence to support the PCR court's decision and an abundance of this evidence is found in the plea affidavit and plea transcript. The plea affidavit form and sentencing sheet both indicate a recommendation. The plea transcript is unambiguously clear that all parties – the assistant solicitor, Counsel, Petitioner, and the plea judge – were all on the same page that the guilty plea offer was a recommended cap of five years and not a negotiated sentence. Petitioner affirmed he understood the judge's information that the State was offering a recommended cap, but he was not bound by the State's recommendation and could sentence Petitioner up to ten years. Furthermore, Petitioner and Counsel acknowledged the discussed the plea affidavit form where Petitioner signed that he understood the charge carried a potential sentence of up to ten years, the State was making a recommendation of five years, and the judge could accept the recommendation or sentence above or below the recommendation. *See* Supplemental Appendix. At no point throughout the plea hearing did Petitioner state he did not understand the recommendation or the plea proceedings.

The PCR court correctly found Counsel was not deficient in his advice because his advice was not deficient. Despite being shocked that a supposedly light-sentencing judge did not accept the State's recommendation, Counsel's advice concerning this recommendation was not deficient and the record clearly shows Petitioner's plea was made freely, voluntarily, and intelligently. Counsel's belief that the judge would not go over the five year cap is simply wishful thinking and there is no evidence that he told Petitioner the sentence would definitely be five years. Petitioner even admitted at the PCR hearing Counsel told him that despite there being a cap of

five years, the judge "could go over it." App. 46, ll. 3-5. The PCR court correctly cited *Wolfe v. State*, 485 S.E.2d 367, 371, 326 S.C. 158, 165 (1997), which held 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. Here, Petitioner acknowledged on the plea affidavit and during the plea hearing that no promises had been made, the charge carried up to ten years, the State was recommending a five year cap, and the plea judge was not bound by the recommendation and could sentence him higher.

Due to the severity of Petitioner's case, the plea judge exercised his discretion and did not follow the recommendation; however Petitioner was aware of this possible outcome as evidenced by Petitioner's acknowledgment in the plea affidavit, Petitioner's acknowledgment that Counsel advised him of this fact, and Petitioner's acknowledgment during the plea hearing when the plea judge informed him of this fact. Thus there is ample evidence to support the PCR court's ruling that Counsel did not give deficient advice when he informed Petitioner that the judge could go over the recommendation and the record fully supports Petitioner's understanding.

II. *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991) was not violated because the successor PCR judge, John C. Hayes, III, did not preside over Petitioner's plea.

Petitioner claims the successor judge, who handled the PCR matter after Judge Kinard's death was the same judge who presided over Petitioner's guilty plea. Petitioner claims without a knowing and voluntary waiver, this violates *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991). Petitioner however, is mistaken as Judge John C. Hayes, III, handled the PCR and Judge J. Mark Hayes, II, handled the plea. Thus no error occurred.

III. The PCR court's credibility findings are not reversible error as the successor PCR judge reviewed the entire lower court record and PCR hearing transcript before issuing his ruling, and these findings only affect the deference this Court gives on review.

The PCR court's credibility findings do not constitute an error of law where the successor PCR judge reviewed the entire lower court record and the PCR hearing transcript before making its ruling and had an opportunity to evaluate the testimony from the PCR hearing in context of the entire record. Likewise, to the extent the successor PCR judge did not have the same opportunity to physically observe the witnesses like Judge Kinard, such a finding only goes to the weight of the PCR court's credibility findings on appellate review and do not warrant the vacation of Petitioner's guilty plea.

First, Respondent would submit Rule 63 SCRCP was not violated in any way because the successor judge certified his familiarity with the proceedings by stating he "reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys." App. 74. Respondent would also point out that the plea affidavit form was filed with the Clerk of Court and was brought before the PCR court and successor PCR judge as part of the "Clerk of Court records." The successor judge in *Christy v. Christy*, 347 S.C. 503, 556 S.E.2d 701 (2001) simply signed a proposed order based on a hearing for which the successor judge specifically declined to review the transcript. In this case, the successor judge was provided with and reviewed the entire lower court record and the PCR hearing transcript before issuing his ruling and credibility findings were entirely appropriate.

Respondent submits the credibility findings do not warrant the reversal of the PCR order because the successor PCR judge can find testimony to be believable or not believable without physically seeing the testimony being spoken. The successor PCR judge had the entire lower

court record and PCR hearing transcript and can certainly find testimony to be believable especially if the testimony is supported by the record and is consistent with other testimony from the PCR or plea hearings. Thus, a witness's testimony can be believable for certain reasons such as if it is supported by the record or is consistent with other testimony, despite not seeing the witness's facial expressions or hearing voice intonations in giving said testimony.

The single credibility finding in the PCR court's order as it relates to ineffective assistance of counsel is where the successor PCR judge found "Counsel's testimony credible that he reviewed the plea affidavit with [Petitioner] and that he argued for mercy on [Petitioner's] behalf." App. 76. The successor PCR judge should be able to articulate that he finds this particular testimony believable, considering the testimony is consistent with the signatures on the plea affidavit form and testimony from the plea hearing. Likewise, the plea hearing testimony completely supports the conclusion that Counsel argued for mercy. These consistencies support the successor PCR judge's finding Counsel's testimony believable even if the judge did not witness Counsel speaking these words at the PCR hearing.

The other credibility finding is found in the section of the order on the voluntariness of the guilty plea and was the successor PCR judge finding "credible Counsel's testimony regarding his preparation and advice concerning the case." App. 78. Again, the successor judge should not be prohibited from finding this testimony believable when it is consistent with Petitioner's testimony at the plea hearing and the PCR hearing.

Most importantly, this Court should not reverse the PCR court's order simply because it made these two specific credibility findings and an overall general credibility finding because such findings only go to the weight by which the appellate courts review the PCR court's findings. They certainly do not warrant vacating the PCR court's ruling where that ruling was

based on the entire record. The general rule is that the appellate courts give great deference to the PCR judge's findings on the credibility of witnesses. See *Drayton v. Evatt*, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993). Respondent would acknowledge that in this situation the deference given by this Court may not be as strong considering the successor PCR judge did not witness the hearing; however, that does not mean the successor PCR judge should be prohibited from making remarks of believability based on the consistent testimony and support from the record. The level of deference given by this Court does not mean the successor PCR judge committed reversible error by making credibility findings. Furthermore, any credibility findings did not affect the outcome of Petitioner's PCR case, considering the issues at hand only necessitated the PCR court ruling based on the plea affidavit form, and the judge's advice, and Petitioner's understanding found in the plea hearing transcript. This evidence provided more than sufficient evidence to deny relief independent of the credibility findings. PCR was properly denied.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

February 12, 2018

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2017-000843

JEREMY CORDERA MOBLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 12th day of February, 2018

Camille Henry

CAMILLE HENRY
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

February 12, 2018

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

Re: **Jeremy C. Mobley v. State of South Carolina**
Appellate Case No. 2017-000843
Lower Court Case No. 2014-CP-46-03296

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/ch
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)