

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2017-001080

RECEIVED

MAR 09 2018

S.C. SUPREME COURT

ISAIAS DIAZ GUTIERREZ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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RESPONDENT'S ISSUE PRESENTED

There is evidence of probative value to support the PCR court's determination that counsel was not ineffective for failing to convey a thirty-year plea offer to Petitioner where Counsel testified he relayed the plea offer and Petitioner testified he would not have accepted the thirty-year offer because he sought a lower offer.

STATEMENT OF THE CASE

Underlying Facts and Trial

On December 29, 2002, Petitioner and his girlfriend Dana Blackmon went to the trailer of the victim, Clarence Cubley. App. 228. Petitioner approached the trailer wearing a black ski mask and holding a cement block. App. 229, 235. When the victim opened the door, Petitioner rushed inside and assaulted the victim by kicking him and slamming the cement block on the victim's head. App. 236, 238. The victim was later found dead as a result of the injuries imposed by Petitioner. Petitioner cut the trailer's phone cord and took the victim's safe. App. 239, 240. Petitioner and Ms. Blackmon took the safe to their home and forged three checks making the checks payable to himself and signing the checks with the name of the victim's wife who passed away three weeks before this incident. App. 259, 262-265. Petitioner presented two checks to Bank of America on December 30, 2002, and obtained money. App. 266-268. The following day, Petitioner presented a third check to a different Bank of America. App. 269. As the tellers became suspicious, Petitioner fled the bank and left two forms of his identification. App. 139-140, 271. Petitioner was ultimately apprehended four years later in Missouri in November 2006. App. 461-462. In the meantime, Ms. Blackmon pled guilty to armed robbery and agreed to testify against Petitioner. App. 285-286.

Petitioner was indicted by the April 2007 term of the York County Grand Jury for three counts of forgery (2007-GS-46-1261, -1264, -1265), armed robbery (2007-GS-46-1262), murder (2007-GS-46-1263), and first-degree burglary (2007-GS-46-1266). Derek Chiarenza, Esquire, represented him. On December 10-13, 2007, Petitioner proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable J. Derham Cole sentenced Petitioner to confinement for five years for each forgery conviction, thirty years for armed robbery, and life

imprisonment for murder and first-degree burglary. All sentences were set to run concurrently.

A notice of appeal was filed on Petitioner's behalf and an appeal was perfected pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. *State v. Gutierrez*, Op. No. 2009-UP-495 (S.C. Ct App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

Post-Conviction Relief Application

On June 23, 2010, Petitioner filed an application for post-conviction relief (2010-CP-46-2611). Petitioner alleged the following grounds for relief:

1. Ineffective assistance of counsel
2. Ineffective assistance of appellate counsel

At the commencement of the evidentiary hearing, Applicant's counsel notified the PCR court Applicant was withdrawing all prior claims, and proceeding only on the following allegations:

1. Ineffective assistance of counsel
 - a. "Failure to tender offer by the State"
 - b. "Failure to challenge admissibility of statement during *Jackson v. Denno* hearing."

An evidentiary hearing into the matter was convened on June 1, 2011, at the Moss Justice Center in York, South Carolina before the Honorable Lee S. Alford. Petitioner was present at the hearing and represented by David Clayton Cook, Esquire. Harrison David Brant, Esquire, of the South Carolina Attorney General's Office represented the State. At the hearing, Petitioner testified on her own behalf. Petitioner's husband and daughter also testified. Petitioner's trial counsel, Derek Chiarenza, Esquire, (hereinafter "Counsel") testified. By Order of Dismissal filed

September 16, 2011, the PCR court denied and dismissed Petitioner's application with prejudice. The PCR court found Counsel was not ineffective for failing to tender the plea offer, finding Counsel communicated the plea offer and Petitioner rejected the offer. App. 826. The PCR court found Counsel was not ineffective for failing to challenge Petitioner's statement, finding Counsel moved to suppress the statement on two separate grounds but was denied. App. 828. The PCR court also found Counsel was not ineffective for failing to prepare the case due to language barriers, finding Petitioner was able to sufficiently communicate with Counsel. App. 829.

On October 21, 2015, Petitioner filed a second PCR application (2015-CP-46-3199). App. 833-919. The matter proceeded to a hearing on April 17, 2017, before the Honorable G. Thomas Cooper. App. 926. Nathan James Sheldon represented Petitioner, and Justin James Hunter represented the State. App. 926. By an order filed on April 19, 2017, Judge Cooper granted Petitioner belated review of his PCR proceeding pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

Petitioner filed a timely notice of appeal and filed his Petition for Writ of Certiorari on dated October 23, 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 in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant 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 applicant must prove "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*, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, at 118, 386 S.E.2d at 625.

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.

ARGUMENT

There is evidence of probative value to support the PCR court's determination that counsel was not ineffective for failing to convey a thirty-year plea offer to Petitioner where Counsel testified he relayed the plea offer and Petitioner testified he would not have accepted the thirty-year offer because he sought a lower offer.

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis that Counsel failed to communicate the State's thirty-year plea offer. The PCR court properly found Counsel was not ineffective, as he provided credible testimony he relayed the offer to Petitioner, and Applicant failed to prove he would have accepted the offer. Certiorari should be denied.

Relevant Testimony and Findings Before PCR Court

At the PCR hearing, Petitioner testified he was not aware of the State's thirty-year plea offer and Counsel did not consult with him concerning the offer. App. 770, ll. 3-4. He testified the offer could have been negotiated for less than thirty years. App. 770, ll. 8-9. Petitioner testified Counsel told Petitioner he was offered thirty years by the State, but Counsel told Petitioner he was not going to take the thirty-year offer and take the case to trial. App. 771, ll. 5-15. According to Petitioner, Counsel told Petitioner he had already rejected the thirty-year offer prior to consulting with Petitioner about the offer. App. 772, ll. 11-13. When asked if he would have taken the thirty-year offer, Petitioner replied he wanted Counsel to negotiate for a plea deal of less than thirty years and "maybe he would have taken it." App. 785, ll. 4-7. Petitioner agreed that if Counsel had not rejected the offer without consulting him, he still would not have taken the thirty-year offer because he wanted a better deal. App. 785, ll. 8-12.

Counsel testified the plea offer was categorically turned down because Petitioner told him he was not going to take thirty years. App. 794, ll. 1-8. He testified if Petitioner wanted to accept the offer then he would have done so. App. 794, ll. 10-11. Counsel testified he never told

Petitioner that he had already turned down a plea offer before relaying the offer to Petitioner. App. 805, ll. 15-20. The PCR court questioned Counsel about the plea offer, and Counsel testified “I turned [the plea offer] down after [Petitioner] told me he did not want it, so I communicated that [Petitioner] would not be taking a thirty-year plea deal. But I did not just do that on my own.” App. 810, l. 22 – 811, l. 2. Counsel testified the plea offer stood for the duration of the trial. App. 811, ll. 3-13.

The PCR court issued an order dismissing Petitioner’s PCR application. Regarding the issue of whether Counsel failed to convey the plea offer, the PCR court specifically found Counsel’s testimony to be more credible than Petitioner’s on this issue. App. 826. The PCR court found “Counsel testified he not only communicated the offer, but the offer was open throughout the course of trial.” App. 826. The PCR court further found Petitioner made the decision to reject the thirty-year plea offer. App. 826. In addressing the prejudice prong, the PCR court found “Applicant testified he wanted something less than what was offered, and would not have taken thirty years.” App. 826.

Deficiency

The PCR court correctly denied Petitioner’s claim that Counsel failed to convey the thirty-year plea offer, as Counsel’s credible testimony established he properly conveyed the offer to Petitioner. Our courts have held “defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Collins v. State*, No. 2014-002397, Shearhouse Advance Sheets, Opinion No. 27767 (filed Feb. 28, 2018) (citing *Missouri v. Frye*, 566 U.S. 134, 145 (2012)). Although Petitioner argues Counsel unilaterally rejected the offer without consulting Petitioner, Counsel testified he turned down the plea offer after Petitioner told him he did not want it. App. 810, l. 22 – 811, l.

25. Counsel explained he relayed the offer to Petitioner prior to notifying the State of Petitioner's rejection, testifying that he "did not just [reject the offer] on [his] own." App. 811, ll. 1-2. This supports the PCR court's finding Counsel relayed the plea offer. Furthermore, the PCR court did not make a general credibility finding, but instead specifically found Counsel's testimony to be more credible than Petitioner's on this issue. App. 826. Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly observe the witnesses. *See Drayton v. Evatt*, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); *see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). The PCR court's findings that counsel was not deficient are supported by the record and must be affirmed.

Prejudice

Furthermore, there is clear evidence Petitioner was not prejudiced by Counsel's alleged failure to convey the plea offer. In addressing prejudice resulting from an attorney's performance where his deficiency caused the plea offer to lapse or be rejected, the United State Supreme Court held:

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability **they would have accepted the earlier plea offer** had they been afforded effective assistance of counsel.

Frye, 566 U.S. at 147, 132 S. Ct. at 1409. (emphasis added).

There is no testimony that Counsel's actions caused the plea offer to lapse or be rejected. Petitioner's testimony at the PCR hearing clearly showed he did not want to accept the thirty-

year offer but wanted an offer of less than thirty years. Petitioner was specifically asked at the PCR hearing if he would have taken the thirty-year offer and he indicated he would not have taken the offer and instead specifically testified he wanted his lawyer to negotiate an offer of less than thirty years and “maybe he would have taken it.” App. 785, ll. 4-7. Petitioner then agreed that he still would not have taken the thirty-year offer if Counsel had consulted with him because he wanted a better deal. App. 785, ll. 8-12. The PCR court correctly found Petitioner was not prejudiced, because there is no testimony or evidence to show Petitioner would have accepted the offer but for Counsel’s performance. The PCR court found Petitioner would not have taken the thirty-year offer, and this finding is fully supported by Petitioner’s testimony at the PCR hearing. As there is evidence of probative value to support these findings, certiorari should be 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,

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By: 
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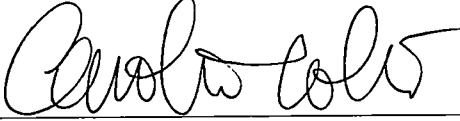
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari Pursuant to Austin v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 9th day of March, 2018



CAROLINE COLLINS
Administrative Coordinator