

STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI
Appeal from Charleston County
Appellate Case No. 2016-001456

RECEIVED
MAR 15 2018
S.C. SUPREME COURT

ONRAE WILLIAMS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Memorandum Opinion No. 2018-MO-009
Heard January 11, 2018 – Filed February 28, 2018

RESPONDENT'S PETITION FOR REHEARING

On February 28, 2018, this Court reversed the Court of Appeals' and the post-conviction relief court's denial of relief to Williams and remanded the matter to the court of general sessions for a new trial. Onrae Williams v. State, 2018-MO-009 (filed February 28, 2018). In reaching this result, this Court concluded the post-conviction relief court erred in denying relief as to Williams' claim trial counsel was ineffective for failing to fully inform Williams of the mandatory nature of the life without parole sentence should Williams be convicted at trial. Specifically, this Court concluded "the colloquy between trial counsel and the trial court did not cure trial counsel's deficiency." This Court concluded Williams was prejudiced by this deficiency finding there was "a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer." Pursuant to Rule 221(a), SCACR,

the State respectfully petitions for rehearing.

Misapprehension of Standard of Review

In seeking rehearing, the State respectfully submits this Court misapprehended the standard of review in post-conviction relief. In reviewing the PCR court's decision, this Court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). "This Court will uphold the findings of the PCR judge when there is *any* evidence of probative value to support them, and will reverse the decision of the PCR judge 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) (emphasis added).

In this case, as discussed below, the record contains three significant pieces of evidence which support the decision of the post-conviction relief court in finding trial counsel was not deficient and sufficiently explained the mandatory minimum sentence Williams was facing. Furthermore, this Court has not held the post-conviction relief court made an error of law; rather this Court appears to have based its decision on a factual determination that trial counsel failed to convey the mandatory nature of the life without parole sentence. Therefore, because the standard of review supports affirmance of the post-conviction relief court's decision, the State asks this Court to reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Misapprehension of Deficiency of Counsel

Williams's trial counsel was asked at the post-conviction relief hearing whether he explained what life without parole meant "in terms of how much time you have to do." Trial counsel responded, "Yes, I believe I did." App. 425, lines 9-11. On cross-examination, the following exchange occurred between William's attorney and trial counsel:

PCR Counsel: Mr. King, I think you mentioned you weren't sure one way or the other whether you explained that life without parole meant mandatory; is that correct?

Trial Counsel: I don't specifically remember exactly what we discussed, but I wouldn't have implied in any way that it was not a mandatory life without parole. If I would have explained it, I would have explained on the third strike you get life without parole, and but [sic] I can't remember that issue coming up with him ever asking is it up to life or is it mandatory life? I don't remember discussing that specific issue, but I have my notes because [sic] I discussed life without parole with him."

App. 427, lines 7-21. In this exchange, trial counsel testifies (1) his notes confirm he and Williams discussed the issue of life without parole generally; (2) trial counsel does not remember the exact specifics of the conversation; (3) but he would not have implied the sentence was not mandatory; (4) if he explained the issue, as he notes confirm he did, he would have said Williams would receive a life sentence after the third strike.

The post-conviction relief court, which heard this testimony in person, engaged in a colloquy with Williams' attorney regarding this exact exchange in the course of delivering her ruling.

PCR Counsel: Mr. King said he wasn't sure.

Court: *That was not his testimony.* He said he explained it to him, he would not have implied to him it meant zero to life.

PCR Counsel: But he said he's not sure if that issue came up.

Court: *That's not the totality of his testimony.* I've listened to his testimony. *I'll resolve any issues of the credibility of his testimony.*

App. 439, lines 11-20 (emphasis added). This type of ineloquent testimony is exactly the reason why this Court gives great deference to the post-conviction relief court's credibility findings – because the post-conviction relief court heard the testimony and the observed witnesses, and after doing so, resolved the ambiguity in trial counsel's testimony in trial counsel's favor. See

Foye v. State, 335 S.C. 586, 589 (1999) (“Where matters of credibility are involved, this Court gives great deference to a judge’s findings, because this Court lacks the opportunity to directly observe the witnesses.”).

This Court also found “the colloquy between trial counsel and the trial court did not cure trial counsel’s deficiency.” Any alleged deficiency of trial counsel can be cured by the trial court’s comments during the trial. See, e.g., Bennett v. State, 371 S.C. 198, 205, n. 6, 638 S.E.2d 673, 676, n. 6 (2006) (“Regardless, even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range.”) (citations omitted). In this case, the trial court specifically informed Williams the only sentence would be life without parole upon conviction.

Trial Counsel: Judge, I think Numbers 13 and 14, I would prefer the Court’s standard charge on those issues.

The Court: We will address those. You can object, but I am going to discuss those aspects of it. *Once they come into the room, the deal is gone. The only sentence is LWOP. He’s made his decision. Do you understand?*

Trial Counsel: Yes, your honor.

App. p. 179 (emphasis added). Williams has argued, and this Court appears to agree, this exchange is insufficient because it is directed at trial counsel rather than Williams himself, and there is no evidence Williams heard the statement. This argument disregards Williams’ burden of proof. The record contains no evidence Williams did not hear the statement, and in fact contains evidence tending to show he did. Williams was present in the courtroom at the time and gave no indication he did not hear or understand the trial court’s comment, and the statement was made immediately following plea negotiations between Williams and the State. App. 176, lines 22-23. It is incumbent upon Williams to present some affirmative evidence – even simply his own testimony – to show he did not hear that statement, and Williams failed to do so.

Accordingly, this contemporaneous evidence in the trial transcript tends to confirm trial counsel's post-conviction relief testimony that he informed Williams of the mandatory nature of the sentence, and it supports the post-conviction relief court's finding trial counsel was not deficient.

Finally, this Court's decision appears to ignore entirely Williams' own comments during sentencing. Petitioner spoke during his sentencing proceeding and never indicated he was unaware the life sentence was mandatory. App. 383, lines 4-14. During the sentencing proceeding, trial counsel acknowledged the mandatory nature of the sentence, but argued it was excessive and unconstitutional in William's specific case. App. 381, line 16 – 382, line 13. The trial court, immediately prior to addressing Williams, confirmed it was "without any discretion" as to the sentence that would be imposed. App. 382, lines 15-16. Williams then spoke and indicated he did not think his *family* understood what was happening, but never stated *he* did not understand.

Williams: I just want to tell my family to stay strong, you know, because I don't think they understand what is going on here; there will be an appeal, and, you know, I still have a chance.

App. 383, lines 10-14. The clear implication from his statement is that he did understand the sentence being imposed, and he would challenge it on appeal.

Throughout this case, Williams has argued, essentially, the fact he rejected the plea offer is evidence of deficiency in itself, because no rational person would do so if he was truly aware he was facing a mandatory life sentence. This argument, however, focuses on the wrong issue as it is concerned with Williams's conduct, not trial counsel's. As even Williams concedes, trial counsel is not required to ensure the client understands all he is told. Reply Brief p. 4. The State agrees Williams needed to be told the life sentence would be mandatory, but once trial counsel

fulfilled that obligation, he was under no duty to ensure Williams made what trial counsel or this Court or PCR counsel considers a rational decision with that information.

In this case, Williams was young, had never served a lengthy prison sentence, the video of the transaction was not entirely clear, and there were credibility issues with the confidential informant. It is not, despite Williams's assertions in hindsight, unreasonable to think a defendant in Williams's position might decide to proceed to trial in the hope of being acquitted and receiving no jail time at all. Trial counsel cannot control what information or decision making factors are important to a client. However, by reversing the post-conviction relief court's finding that trial counsel was not deficient, despite the exist of probative evidence in the record to support that finding, it appears this Court is in fact imposing a requirement on trial counsel not only to explain the mandatory nature of the sentence, but also to do something more to ensure the client uses that information in an "acceptable" or "rational" way. This not only exceeds the current standard for a finding of deficiency, it is an impossible and unworkable standard for trial counsel to meet.

Relatedly, Williams has repeatedly argued this sentence is unfair due to the total amount of drugs involved in each of Williams's three convictions and given Williams's age and socioeconomic background. The State respectfully submits those considerations are also improper for review in a post-conviction relief action. Public policy is the province of the legislature, and the legislature enacted a strike system to deal with the problem of recidivist offenders. Williams's two prior convictions were appropriate to use for enhancement under the language of the statute, and the State timely served notice of its intent to seek life without parole, which Williams does not dispute. Williams is a recidivist offender who committed three drug crimes within a time frame of approximately five years, despite spending some of that period

incarcerated. Moreover, Williams did not have these drugs merely for personal use; he was convicted, repeatedly, of distribution of crack cocaine within proximity to a school. The argument Williams should be excused from a constitutional, properly enacted statutory enhancement scheme because of the amount of drugs involved or the fact he was a young adult or grew up in a disadvantage area is essentially the same cruel and unusual punishment argument trial counsel made during sentencing, which was fully briefed and denied on the merits on direct appeal.

Based on the foregoing, counsel did not perform deficiently. Therefore, the post-conviction relief court properly denied this allegation, and its ruling is supported by evidence of probative value in the record. The State respectfully submits the standard of review is dispositive, and this Court erred in its reversal of the post-conviction relief court. Therefore, the State asks this Court to reconsider its decision, rehear the matter, and affirm the lower court's denial of post-conviction relief.

Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Brief of Respondent and raised during the oral argument before this Court, the State respectfully requests this Court reconsider its decision, rehear the matter, and affirm the decision of the lower court denying Petitioner relief. —

Respectfully submitted,

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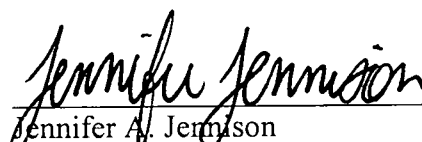
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Respondent's Petition for Rehearing** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

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This 15th day of March, 2018.



Jennifer A. Jemison
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