

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2017-001152

RECEIVED

APR 06 2016

S.C. SUPREME COURT

ABBDUL OMAR EMMANUEL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

Counsel was not ineffective in his advice concerning the guilty plea where Counsel discussed the sentencing ranges Petitioner faced and the State's recommendation, Counsel did not promise or guarantee a specific sentence, and the plea court thoroughly discussed the sentencing ranges and recommendation to Petitioner.

STATEMENT OF THE CASE

Dontavion White and Maurice Burris approached Logan Hughes to help them find someone from whom to buy marijuana. App. 18. White called Petitioner and planned to pick him up on the way to buy the marijuana. App. 18. A young woman dropped Petitioner off at Hughes' car. The four went to a house on Cedar Grove Lane in Rock Hill to purchase marijuana from Hughes' contact. App. 19. As they entered the house, Petitioner pulled out a pistol and pointed it at the men inside. App. 20. Petitioner exchanged words with the victim and shot him three times in the chest and leg. App. 20. The victim died as a result of his injuries. App. 20. The two other men in the house ran outside to hide and Hughes followed and hid with them. App. 20. As Petitioner, Burris, and White went to the car to leave, Petitioner saw Hughes and fired shots at Hughes and Rafeal Renta, another resident of the house who had escaped. App. 21. Hughes went back to his house and later told police what happened. App. 21. Petitioner stole a shotgun from the Cedar Grove residence and discarded it in the nearby woods where it was later recovered. App. 22. Petitioner was identified in a lineup by Renta. Officers located the woman who dropped Petitioner off at Hughes' car prior to the robbery, who identified Petitioner in a lineup. App. 23. Petitioner ultimately turned himself in and was indicted for murder, possession of a weapon during the commission of a violent crime, armed robbery, and criminal conspiracy.

Petitioner was indicted at the April 2014 term of the York County Grand Jury for murder (2014-GS-46-1220), possession of a weapon during the commission of a violent crime (2014-GS-46-1220A), armed robbery (2014-GS-46-1221), possession of a weapon during the commission of a violent crime (2014-GS-46-1221A), criminal conspiracy (2014-GS-46-1222), and pointing/presenting a firearm (2014-GS-46-1223). Petitioner waived presentment to the grand jury on additional charges of criminal conspiracy (2014-GS-46-1503), assault and battery

of a high and aggravated nature (ABHAN) (2014-GS-46-2876), possession of a weapon during the commission of a violent crime (2014-GS-46-2876A), unlawful carrying of a pistol (2014-GS-46-2884), and criminal conspiracy (2014-GS-46-2885).

Petitioner was represented by Tyler Burns, Esquire, on these charges. On July 21, 2014, Petitioner and his plea counsel appeared before the Honorable Roger Couch and pled guilty to voluntary manslaughter as a lesser included offense of murder, possession of a weapon during the commission of a violent crime, armed robbery, and one count of criminal conspiracy. Sentencing was deferred to September 29, 2014. Petitioner appeared on September 29, 2014, before the Honorable Edward Miller and pled guilty to the other charges as indicted. Petitioner was sentenced with all sentences running concurrently except armed robbery. He was sentenced to imprisonment as follows: thirty years for voluntary manslaughter, five years for all three counts of criminal conspiracy, twenty years for ABHAN, five years for all three charges of possession of a weapon during the commission of a violent crime, five years for unlawful carrying of a pistol, and ten years for armed robbery. Petitioner did not file a notice of appeal.

Post-Conviction Relief Application

On September 11, 2015, Petitioner filed an application for post-conviction relief, alleging Counsel was ineffective for failing to investigate and for failing to object during sentencing. He further alleged "I was promised by my attorney that if I took the plea that I wouldn't receive 'no more' than 20-25 years." App. 70. On or about July 8, 2016, the State filed a return. App. 72-76. An evidentiary hearing into the matter was convened on Wednesday, February 1, 2017, at the Moss Justice Center in York, South Carolina. Petitioner was present at the hearing and represented by Nathan Sheldon, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented the Respondent. At the hearing, Petitioner testified on his

own behalf. Tyler Burns, Esquire, also testified. This Court also had before it a copy of the records of the York County Clerk of Court regarding the subject convictions, Petitioner's records from the South Carolina Department of Corrections, Respondent's Return, and the two plea transcripts.

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 Counsel was not ineffective for failing to investigate. App. 128-129. The PCR court found Counsel was not ineffective in his plea advice to Petitioner, as he did not promise or guarantee a specific amount of prison time to Petitioner and Petitioner was well-informed of the sentences he faced and the State's recommendation from the plea judge. App. 129-130.

A timely notice of intent to appeal was served on May 16, 2017. The Petition for Writ of Certiorari was submitted, dated November 20, 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

Counsel was not ineffective in his advice concerning the guilty plea where Counsel discussed the sentencing ranges Petitioner faced and the State's recommendation, Counsel did not promise or guarantee a specific sentence, and the plea court thoroughly discussed the sentencing ranges and recommendation to Petitioner.

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

Plea Hearings

Petitioner appeared before Judge Couch on July 21, 2014 and pled guilty to voluntary manslaughter, possession of a weapon during the commission of a violent crime, criminal conspiracy. App. 2-3. Deputy Solicitor Willy Thompson explained to the plea court, "the recommendation of the State in this case is for the defendant is 20 to 40 years. So he has a range of a minimum for 20, a maximum of forty years." App. 3, ll. 5-8. Before going over the pending charges, Judge Couch informed Petitioner,

Plea Court: The State is making a recommendation concerning sentencing. I will advise you throughout all of these charges that recommendations are just that. I am sure that the judge that will handle sentencing will give it great deference and will consider that but the judge is not necessary bound by recommendations. Do you understand that?

Petitioner: Yes, sir.

Plea Court: So that means as I go through these charges I will be discussing with you the maximum sentences that are available under the law and will advise you that the sentencing judge could sentence you to the maximum if the judge choose to do so. Do you understand that?

Petitioner: Yes, sir.

App. 6, l. 21 - 7, l. 2. Judge Couch advised Petitioner of the sentencing ranges for voluntary manslaughter, possession of a weapon during the commission of a violent crime, criminal conspiracy, and armed robbery. App. 5-9. After advising Petitioner of his Constitutional rights, Judge Couch asked,

Plea Court: Has anyone made any promises, guarantees or assurances to you

about any matter in connection with these pleas at all?

Petitioner: No, sir.

App. 14, ll. 17-20. Petitioner then admitted he was guilty and the plea court accepted his plea as made freely and voluntarily. App. 25. Sentencing on these charges was deferred until September 29, 2014, where Petitioner pled guilty to six more charges.

Petitioner appeared before Judge Miller on September 29, 2014 to be sentenced for voluntary manslaughter, possession of a weapon during the commission of a violent crime, criminal conspiracy, and armed robbery and to plead guilty and be sentenced to new charges. At the beginning of this plea hearing, Assistant Solicitor Chris Epting advised Judge Miller of Petitioner's prior guilty plea and informed the court, "He plead guilty to those in July with a negotiated sentence of a minimum of 20 years and a maximum of 40 years." App. 30, ll. 17-19. He further informed the court, "[w]e've agreed to a negotiated sentence that any sentence he receives today would be concurrent to what sentence he will receive on the remaining [charges]." App. 30, ll. 22-25. Judge Miller advised Petitioner of the sentencing ranges for unlawful possession of a handgun, criminal conspiracy, ABHAN, and possession of a weapon during the commission of a violent crime. App. 6-7, 17. Petitioner was advised of his Constitutional rights and admitted his guilt, and the plea judge accepted his plea as freely and voluntarily made. App. 8-9; 18. Petitioner was sentenced to a total of forty years, thirty years for voluntary manslaughter and ten years for armed robbery to run consecutively.

PCR Hearing

At the PCR hearing, Petitioner testified the first plea offer he received was for forty-five years, which he rejected immediately. App. 86-87. He testified when he pled guilty, he believed he was pleading to a twenty to twenty-five year sentence and did not know that the State's recommendation was twenty to forty years. App. 89. On cross-examination, Petitioner testified

he did not know what the Solicitor meant when he said at the plea hearing that the State's recommendation was twenty to forty years. App. 91, ll. 16-24. He testified he did not remember the plea judge going over the potential sentences of the charges, nor did he remember the plea judge telling him that he was not bound by the State's recommendation. App. 92, ll. 2-9. Petitioner did acknowledge he told the plea judge no one had promised him a length of sentence he would receive as a result of the plea. App. 92, ll. 16-18.

Counsel testified despite Petitioner's young age, Petitioner was still able to converse with Counsel and discuss their case because it was not Petitioner's first time in the judicial system and Petitioner was familiar with the criminal justice process. App. 97, ll. 12-18. Counsel testified the State had "extremely overwhelming evidence" against Petitioner. App. 99, l. 8. Counsel testified he discussed the State's final plea offer with Petitioner three or four times, went over the pros and cons of pleading guilty, and did not pressure Petitioner for an answer. App. 101, ll. 17-23. He testified the State's final plea offer was to reduce murder to voluntary manslaughter, to drop several charges, and recommend a sentencing range of twenty to forty years. App. 102, ll. 11-19.

Counsel testified he never promised Petitioner a sentence of twenty to twenty-five years, but told Petitioner that considering his age, the best case scenario would be around that range. App. 103, l. 25 – 104, l. 3. He testified he told Petitioner that the Department of Corrections calculates time and he was not going to try to compute how much time Petitioner would be serving. App. 103, ll. 8-19. Counsel testified he told Petitioner it was possible he could receive forty years, given the recommendation, but a range of twenty-five to thirty years would be a best case scenario. App. 104. He further testified he told Petitioner there were too many factors to guarantee a particular sentence. App. 104, ll. 16-21. He told Petitioner an educated guess of what he thought the judge might give based on his history, but made sure to tell Petitioner that his

guess could be wrong and he still faced forty years. App. 104, l. 21 – 105, l. 6. Counsel testified he never told Petitioner that he would receive between twenty to thirty years, but instead explained the legal minimum sentence and legal maximum sentence he could receive on the charges. App. 105, ll. 10-21. Counsel testified Petitioner never gave him any indication that he thought he was promised twenty to twenty-five years, and he made his own plea affidavit that included a provision specifying Petitioner was facing a recommendation of twenty to forty years and Petitioner signed the affidavit. App. 106, ll. 3-11. Counsel testified he believed pleading guilty was in Petitioner's best interest because Petitioner admitted to the crimes and the State said they would seek life without the possibility of parole on two of his sentences if they proceeded to trial. App. 106.

The PCR court denied Petitioner's PCR application and found Counsel was not ineffective in his advice about Petitioner's plea. App. 129. The PCR court found Counsel relayed the plea offer recommendation of twenty to forty years and did not promise or guarantee a specific amount of time that Petitioner would receive. App. 129. The PCR court found Petitioner's belief that he would receive a sentence between twenty and twenty-five years did not change the fact that he was well informed from Counsel prior to the plea and from the plea judge during the plea hearing that the recommendation from the State was twenty to forty years. App. 129. The PCR court further found Petitioner was well aware the plea judge did not have to accept the State's recommendation.

Analysis

The PCR court correctly found Counsel's performance was not deficient because the record shows Counsel went over the State's plea offer and recommendation and did not promise Petitioner a specific sentence. There is clear evidence to support the PCR court's decision from

the PCR hearing where Counsel testified he discussed the State's plea offer several times and allowed Petitioner time to make a decision. Counsel discussed the pros and cons of taking the plea offer. Counsel specifically testified he did not promise Petitioner a specific sentence and advised him several times that he faced up to forty years with the State's recommendation. Counsel also made it clear to Petitioner that the Department of Corrections calculates time and there were too many factors involved for Counsel to give any promise or guarantee as to a specific sentence. Although Counsel testified he gave Petitioner an "educated guess" as to how much time Petitioner might receive, it is clear from Counsel's extensive testimony that he made sure Petitioner knew this was simply a guess, it could be wrong, the State's recommendation was still twenty to forty years, and the plea judge could sentence him to forty years based on the recommendation. Counsel even made his own plea affidavit where he explained the potential sentences, including the recommendation, and Petitioner signed this affidavit acknowledging the recommendation was twenty to forty years.

Furthermore, the record reflects Petitioner was well aware of the State's recommendation during the plea hearings. The solicitor in each plea hearing made it clear the State's recommendation was for a sentence of twenty to forty years. App. 3; 30. Petitioner acknowledged during the first plea hearing the judge was not bound by the recommendation and acknowledged no one had made promises or guarantees in his plea. App. 6; 14. Furthermore, both plea judges thoroughly discussed the potential sentence Petitioner could receive on every charge. Petitioner should not be able to depart from his statements made under oath, and his vague testimony at the PCR hearings that he simply did not understand anything said at the plea hearings cannot overcome his clear, unambiguous statements made during both plea hearings. The PCR court properly 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 during the plea hearings that no promises had been made, the State was recommending a twenty to forty year sentence, and the plea judge was not bound by the recommendation. Aside from Petitioner's self-serving testimony, there is no evidence in the record that would suggest Petitioner was not well-informed by Counsel was the plea judge as to his potential sentences and the State's recommendation, or that plea was not made freely and voluntarily. There is no evidence Counsel gave incorrect advice, and there is an abundance of evidence listed above to show Counsel thoroughly explained the State's recommendation and potential sentences, while giving no promises or guarantees. Accordingly, certiorari should be denied on this ground.

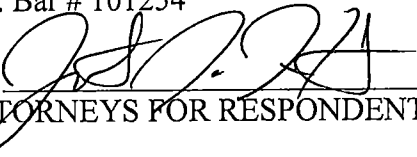
CONCLUSION

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

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April 6, 2018

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APR 06 2018

S.C. SUPREME COURT

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The Honorable J. Mark Hayes, II, Circuit Court Judge

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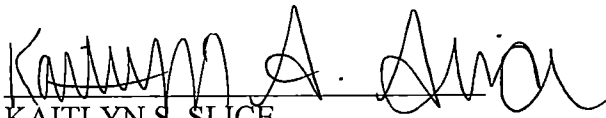
Respondent.

CERTIFICATE OF SERVICE

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

Laura A. Baer, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 6th day of April, 2018


KAITLYN S. SLICE
LEGAL ASSISTANT



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APR 06 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 6, 2018

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

Re: Abdul Emmanuel v. State of South Carolina
Appellate Case No. 2017-001152
Lower Court Case No. 2015-CP-46-2745

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/ks
Enclosures

cc: Laura R. Baer, Esquire (2 copies)