

RECEIVED

APR 27 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County
Court of Common Pleas
The Honorable William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2017-001259

JAMES N. STARNES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

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

ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT’S QUESTIONS PRESENTED1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW4

ARGUMENT.....6

 I. There is evidence of probative value in the record to support the PCR judge’s finding that
 Petitioner has failed to demonstrate he suffered prejudice but for trial counsel’s
 “purportedly” deficient performance.....6

CONCLUSION.....10

RESPONDENT'S QUESTIONS PRESENTED

Is there evidence of probative value in the record to show Petitioner established the prejudice prong in proving but for counsel deficient advice he would have pled guilty instead of going to trial?

STATEMENT OF THE CASE

Procedural History

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court of Lancaster County. During its November 2011 term the Lancaster County Grand Jury indicted Petitioner for trafficking in cocaine base between 10 and 28 grams (2011-GS-29-1278), trafficking in cocaine between 28 and 100 grams (2011-GS-29-1279), possession with intent to distribute marijuana (2011-GS-29-1280), possession of a schedule I, II, III, IV, and V controlled substance (2011-GS-29-1281), and possession or display of a firearm or knife during the commission of a violent crime (2011-GS-29-1282). Mike Lifsey, Esquire, represented Petitioner. On June 2, 2013, Petitioner proceeded to trial before the Honorable Brian Gibbons and a jury. The jury convicted Petitioner of possession with intent to distribute marijuana, possession of a schedule I, II, III, IV, and V controlled substance, and possession or display of a firearm or knife during the commission of a violent crime. The jury also convicted Petitioner of the lesser included offense of trafficking in cocaine 10-28 grams from the trafficking in cocaine between 28 and 100 grams (2011-GS-29-1279). Additionally, the jury found Petitioner not guilty on trafficking in cocaine base between 10 and 28 grams (2011-GS-29-1278). Judge Gibbons sentenced Petitioner to five years for each charge of trafficking in cocaine, possession with intent to distribute marijuana, and possession or display of a firearm or knife during the commission of a violent crime. Petitioner was sentenced to six months for the possession of a schedule I, II, III, IV, and V. controlled substance. The sentences were set to run concurrently. Petitioner did not appeal his convictions or sentences.

On March 31, 2016 Petitioner filed an application for post-conviction relief. Respondent made its return on November 23, 2016 requesting an evidentiary hearing be convened. An

evidentiary hearing was held on January 10, 2017, at the Lancaster County Courthouse before the Honorable William Jeffery Young. Petitioner was present at the hearing and was represented by Nathan Sheldon, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Thereafter, Judge Young denied Petitioner's PCR application by written order filed May 15, 2017.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing 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 PCR 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 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, 286 S.C. 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, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 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, 466 U.S. 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 standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of

the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

There is evidence of probative value in the record to support the PCR judge's finding that Petitioner has failed to demonstrate he suffered prejudice but for trial counsel's "purportedly" deficient performance

Petitioner argues trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution where it was undisputed that neither trial counsel nor Petitioner knew that possession of a weapon during the commission of a violent crime carried a mandatory sentence of five years that must be served "day-for-day" and Petitioner testified he would have accepted the state's offer of a three-year sentence had he known of the nature of the sentence he would receive following a trial ending in a guilty verdict. However, this argument is without merit as Petitioner has failed to demonstrate he suffered prejudice.

During the evidentiary hearing, Petitioner went forward on the sole allegation that trial counsel was ineffective for failing to advise him that the offense of possession of a weapon during the commission of a violent crime was required to be served day for day. (App.p.430). Petitioner testified that if he had known the sentence was a five year day for day sentence, then he would have accepted a previous plea offer rather than proceed to trial. (App.p.430).

As noted in the Order of Dismissal, trial counsel conceded at the evidentiary hearing that he was not aware that the possession of a weapon during the commission of a violent crime charge was a five year day for day sentence. (App.p.429). Trial Counsel testified the State initially offered Petitioner to plead guilty and receive ten years. (App.p.405). Trial Counsel testified Petitioner did not express any interest in this offer. (App.p.405). Trial Counsel testified immediately prior to trial, Petitioner was offered a plea deal of five years. (App.p.405). Trial counsel testified the intention was that Petitioner's plea deal would have been a "parole eligible

five years.” (App.p.405). Trial Counsel testified he did not remember whether the gun charge would have been included in that offer, but the intention was that it would have been a five year, parole eligible sentence if accepted. (App.p.405-406). He testified Petitioner rejected that plea offer as well. (App.p.406).

Trial Counsel further testified that during the trial, there was another plea offer extended by the State. (App.p.406). While not entirely sure of the details, trial counsel testified that it was either a cap of five years, with the trial judge indicating he would sentence the Petitioner to three years, or a recommended three years. (App.p.406). Trial Counsel testified Petitioner rejected that plea offer as well. (App.p.406).

The PCR Court found Petitioner had failed to meet his burden of proving ineffective assistance of counsel. Specifically, the PCR court found Petitioner had failed to convince the court that but for counsel’s purportedly deficient performance, he would have accepted any of the previous offers rather than proceed to trial. See Lafler v. Cooper, 566 U.S 156, 163 (2012). The PCR court found trial counsel’s characterization of Petitioner’s desire to avoid jail to be both probative and credible. The PCR court found Petitioner chose to reject multiple beneficial offers, including a potential three year sentence, and instead proceeded to trial on a charge that carried a maximum of **twenty-five years** imprisonment.¹ The PCR court found even assuming, as discussed during the PCR hearing, that Petitioner felt he would at most be convicted of the lesser included offense of trafficking between ten and twenty-eight grams, the maximum sentence on that offense was still up to ten years imprisonment. The PCR court concluded that under either scenario, Petitioner’s self-serving testimony that he would have pled guilty if he had known that

¹ Petitioner proceeded to trial on the charge of trafficking between twenty-eight and one hundred grams of cocaine, a crime punishable for a first offense of between seven and twenty-five years imprisonment.

upon conviction five of those years would have had to be served day for day was entirely unbelievable, especially when taking into account that he had already *rejected* a potential three year offer during trial.(App.p.431).

There is evidence of probative value to support the PCR court's finding trial counsel did not render ineffective assistance of counsel by failing to inform Petitioner that his possession of a weapon charge was day for day as Petitioner has failed to establish prejudice. In this case, unlike many others where defendants plead guilty and argue had their counsel not been ineffective they would have proceeded to trial, Petitioner went to trial but now contends he would have pled guilty had he known about the mandatory five year day for day sentence for the possession of a weapons charge. Petitioner's argument rest on a litany of cases that stands for the proposition that applicants can demonstrate prejudice by offering testimony they would not have pled guilty and gone to trial absent erroneous advice by counsel. Here, as the PCR court correctly noted Petitioner is unable to prove prejudice by establishing he would have accepted any of the previous plea offers instead of proceeding to trial. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. United States v. Morrison, 449 U.S. 361, 364–365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

The United States Supreme Court held the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. Missouri v. Frye 566 U.S. 133 (2012). The court also articulated an analysis for finding prejudice. 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. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. Missouri, 566 U.S. at 147. Here assuming plea counsel was deficient, the PCR court made the credibility finding that Petitioner's testimony was both self-serving and entirely unbelievable. The PCR court's findings on matters of credibility are given great deference by this Court. Simuel v. State, 390 S.C. 267, 701 S.E. 2d 738, 739 (2010). The PCR court found Petitioner chose to reject multiple beneficial offers, including a potential three year sentence, and instead proceeded to trial on a charge that carried a maximum of **twenty-five years** imprisonment. Given the PCR's court credibility findings, Petitioner argument fails. As a result, Petitioner suffered no prejudice from trial counsel's alleged deficiency.

CONCLUSION

For the foregoing reasons, the petition should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: 

ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

April 27, 2018

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO LANCASTER COUNTY
Court of Common Pleas

The Honorable William H. Young, Circuit Court Judge

Appellate Case No. 2017-001259

JAMES NICHOLAS STARNES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

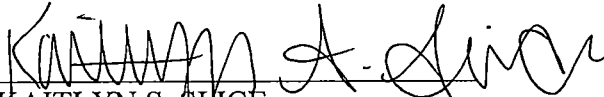
Respondent.

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:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 27th day of April 2018


KAITLYN S. SLICE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

April 27, 2018

RECEIVED

APR 27 2018

S.C. SUPREME COURT

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

Re: James N. Starnes v. State of South Carolina
Appellate Case No. 2017-001259
Lower Court Case No. 2016-CP-29-0373

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,

Deshawn H. Mitchell
Assistant Attorney General
SC Bar No. 101813

DHM/ks
Enclosures

cc: Susan B. Hackett, Esquire (2 copies)