

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Aiken County
Robert E. Hood, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-000001

RAPHAEL WOODEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX1

RESPONDENT’S ISSUE PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW5

ARGUMENT

Probative evidence supports the PCR court’s finding that Plea Counsel was not ineffective for failing to properly explain Petitioner’s parole eligibility before he plead guilty where the record shows Plea Counsel’s explanation was correct under South Carolina law.7

CONCLUSION.....12

ISSUE PRESENTED

Did the post-conviction relief judge err in finding defense counsel did not give petitioner erroneous advice regarding parole eligibility that induced Petitioner's guilty plea?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was true bill indicted at the February 2014 term of the Aiken County Grand Jury for three counts of armed robbery, murder, and possession of a weapon during the commission of a violent crime (2014-GS-02-00135; -00136; -00137; -00138; -00139). Tanya D. Jeffords, Esquire represented Petitioner. On November 14, 2014, Petitioner pled guilty before the Honorable R. Knox McMahon. Judge McMahon sentenced Petitioner to twenty-five-year terms of imprisonment for each count of armed robbery and a twenty-five-year term of imprisonment for the lesser included offense of voluntary manslaughter, to run concurrently. One count of armed robbery and the possession of a weapon during the commission of a violent crime were *nolle prossed* pursuant to the plea. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed a timely application for post-conviction relief on March 9, 2015. Petitioner subsequently amended his application on May 11, 2016, to include additional allegations. In his application, Petitioner alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failing to properly explain the sentencing collateral affects and parole;
 - b. Failing to mitigate and examine co-defendant sentences;
 - c. Failing to move for a motion to reconsider
 - d. Failing to request a continuance under *Langford*;
 - e. Failing to investigate and challenge extradition process and due process violations;
 - f. Failing to object to improper solicitor comments at sentencing and identifying issues with discovery.
2. Prosecutorial Misconduct
 - a. Failing to reveal the deal.

Respondent submitted its return on March 27, 2015. An evidentiary hearing into the matter was convened on September 23, 2016, at the Aiken County Courthouse before the

Honorable Robert E. Hood. Petitioner was present at the hearing and was represented by Aimee Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the PCR hearing, Petitioner testified on his own behalf. Respondent presented testimony from Solicitor Strom Thurmond, Jr. and Trial Counsel Tanya D. Jeffords.

Judge Hood denied and dismissed the application in an Order signed October 28, 2016, and filed November 3, 2016. Petitioner filed a motion to reconsider dated November 10, 2016. Respondent submitted a return to the motion on December 5, 2016. Judge Hood denied the motion in an order filed December 8, 2016. Petitioner filed a timely Notice of Appeal on December 28, 2016. Petitioner filed a Johnson Petition for Writ of Certiorari and Appendix on August 18, 2017. On January 3, 2018, this Court directed the parties to address the following question: Did the post-conviction relief judge err in finding defense counsel did not give petitioner erroneous advice regarding parole eligibility that induced Petitioner's guilty plea? Petitioner's Petitioner for Writ of Certiorari addressing this issue was filed March 2, 2018. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. The proper standard of review of a post-conviction relief 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 post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238 (1969). In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea and of the charges against him. Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995). Parole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). However, "if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked." Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989)). "Likewise, if the judge misinforms the defendant about parole eligibility, then the defendant is entitled to a new trial." Id.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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*, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. *Cherry*, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). 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

Probative evidence supports the PCR court's finding that Plea Counsel was not ineffective for failing to properly explain Petitioner's parole eligibility before he plead guilty where the record shows Plea Counsel's explanation was correct under South Carolina law.

Petitioner argues the PCR court erred in failing to find Trial Counsel ineffective for giving erroneous advice regarding parole eligibility that induced Petitioner's guilty plea. However, Plea Counsel cannot be deficient on this ground because the record shows her advice to Petitioner about his parole eligibility was correct under South Carolina law. Accordingly, the PCR court properly denied post-conviction relief, and this Court should deny certiorari.

Petitioner was originally indicted for murder, which carries either the death penalty or a sentence ranging from a mandatory minimum of thirty years to life without parole. S.C. Code Ann. § 16-3-20(A) (1976). The State did not seek the death penalty, so Petitioner faced a term of imprisonment ranging from thirty years to life without parole. Regardless of the sentence he was given, he would not have been entitled to any form of parole or early release if convicted of murder. S.C. Code Ann. § 16-3-20(A) (“No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program...”)

In contrast, voluntary manslaughter carries a potential sentence ranging from two to thirty years imprisonment. S.C. Code Ann. § 16-3-50 (1976). Voluntary manslaughter is classified as a Class A felony offense in South Carolina, which means it is a “no parole offense.” S.C. Code Ann. 1976 § 16-1-90; S.C. Code Ann. 1976 § 24-13-100. An inmate convicted of a “no parole offense” is not eligible for early release, discharge, or community supervision until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. § 24-13-150(A). After completing eighty-five percent of the term of imprisonment for a

“no parole offense,” an inmate is eligible to participate in a community supervision program operated by the Department of Probation, Parole, and Pardon Services. S.C. Code Ann. § 24-21-560. This community supervision program essentially functions in the same way as parole, where the inmate is released from prison but is supervised by a member of the Department of Probation, Parole, and Pardon Services. See Id.

An inmate convicted of a “parole-able” offense is eligible for early release after serving part of their sentence. S.C. Code Ann. § 24-21-610 provides that an inmate sentenced for not more than thirty years may be eligible for parole after serving at least one-third of the term of imprisonment. It further provides that an inmate serving more than thirty years for a parole-able offense may be eligible for parole after serving at least ten years. During their parole term, the inmate is supervised by a member of the Department of Probation, Parole, and Pardon Services, and may have to adhere to certain restrictions and terms set for their parole, and if they do not comply with the terms, they are imprisoned. S.C. Code Ann. §24-21-660.

Essentially, the three options for South Carolina convictions are (1) crimes that do not allow any parole at all and must be served day-for-day, such as murder; (2) “no parole” offenses, such as voluntary manslaughter, which do not allow eligibility for parole, but which allow for eligibility in a community supervisions program which functions in the same manner as parole after serving 85 percent of the sentence; and (3) “parole-able” offenses, which allow eligibility for parole after serving portion of the sentence. Accordingly, even though the crime of voluntary manslaughter is not classified as a “parole-able” offense, it still allows for parole, whereas a conviction for murder for not allow for parole at all and would have to be served day-for-day.

Petitioner alleges Plea Counsel advised him incorrectly about his parole eligibility when he chose to accept the guilty plea to voluntary manslaughter rather than going to trial for murder.

He asserts Plea Counsel told him that voluntary manslaughter is a “paroleable” offense that would allow him to have parole, and that he should plead guilty to get a twenty-five year sentence that would be eligible for parole rather than risking a mandatory minimum sentence of thirty years with no parole for murder. Petitioner testified that his parole eligibility for voluntary manslaughter was one of the only reasons he pled guilty. App. 55.

Plea Counsel testified at the evidentiary hearing that she explained Petitioner’s parole eligibility to him in their discussions about whether to accept the guilty plea offer. She explained how the State offered her the deal and explained the parole eligibility to her:

So when they finally -- on that week before, they called me and may have been about a Friday or a Saturday, I don't remember what it was but we all sat down and they said that they would offer a voluntary. And I think we started out at 30 or something and then it was 25. I think I was saying, well and I hadn't talked to Mr. Wooden at this point. It was our first opportunity. 20 and they actually -- one of the prosecutors put it on a grid, you know, if he did voluntary manslaughter at least he would be eligible and have to do 85 percent. It came out to about 22 or something like that. That was on a piece of paper. I remember that.

...

I went back. I spoke with Mr. Wooden about it...I talked to the family because I think that, you know, it's very difficult for a 19-year-old to make all the decisions. And they assured me. And so I talked to the family about the risks.

App. 88, line 17 – 89, line 17. She continued:

I think where the confusion may have come in because I knew it was – that for South Carolina it's a no parole-able offense. We talked about that. But you have to do 85 percent. And there's another statute that said you have to do 85 percent. To me that is parole-able.

And in Georgia, if you say it's no parole that means you have to do day-for-day. So and me saying parole I'm going over 85 percent. I never indicated it would be a one-third or that sort of thing. And as discussed that you would have to do at least 85 percent of that charge because that was my understanding of the law.

And, when he wrote me afterwards I was concerned that I had made a mistake that, you know, absolutely he would have to do every day of 25 years. And, you know, just confirmed that, no, still you have to do at least 85 percent. I did explain to him you could do every day or they could let you out earlier.

And so I think that's – maybe that's where the confusion came in with the no parole-able and parole-able sort of situation.

App. 90, line 15 – 91, line 13.

After a discussion on cross-examination about whether Plea Counsel could have confused Petitioner in her advice about parole eligibility with the law in Georgia, where she also practices, Plea Counsel clarified the following:

PCR court: Okay. So you told [Petitioner] prior to him pleading guilty that it was 85 percent, right?

Plea Counsel: I think that I talked to him about the numbers.

PCR court: Right. If he pled to 25, 22 and some change based upon the chart.

Plea Counsel: Yes.

PCR court: And that conversation took place prior to him entering the guilty plea, correct?

Plea Counsel: Yes, but I had always talked about it as a parole-able offense.

PCR court: Sure. Okay.

...
Ms. Zmroczek: So even though you wrote the letter in February of 2015 explaining the 85 percent, it's your testimony that you talked about the 85 percent prior to his pleading?

Plea Counsel: Yes, because I researched it. That's what I looked at.

Zmroczek: I just wanted to clarify that. Thank you.

Plea Counsel: But I did say it was parole-able because I felt like 85 percent was parole-able.

App. 104, line 6 - 106, line 14.

In its Order of Dismissal, the PCR court held Plea Counsel was not ineffective for failing to properly explain Petitioner's parole eligibility. App. 121. The PCR court found Plea Counsel's

testimony regarding this issue was more credible than Petitioner's testimony that she explained his eligibility incorrectly. App. 121.

This testimony from the evidentiary hearing shows Plea Counsel correctly advised Petitioner and his family before his guilty plea that he would have to serve at least 85 percent of his sentence if he pled guilty to voluntary manslaughter. Although she may have referred to the crime as a "parole-able" offense because it allowed for the opportunity for the community supervision program, which essentially functions in the same way as parole, in comparison to murder, which did not and must be served day-for-day, her advice as a whole was correct under South Carolina law. Plea Counsel testified that she did explain the numbers to Petitioner before he chose to plead guilty. After he pled and was told by SCDC that he was serving a "no parole" offense, he wrote to Plea Counsel, who clarified again that he would be eligible for early release after serving at least 85 percent of his sentence.

Plea Counsel undertook the responsibility to advise Petitioner of his parole eligibility and lack of eligibility. Because her advice was functionally correct under South Carolina law and she fully explained the consequences and risks that pleading to voluntary manslaughter would involve on his parole eligibility, Petitioner may not collaterally attack his guilty plea. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). Therefore, because Plea Counsel's advice was correct under South Carolina law, and because the PCR court's findings are supported by probative evidence in the record, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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July 16, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-000001

RAPHAEL A. WOODEN,

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:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 16th day of July, 2018


KAITLYN S. SLICE
LEGAL ASSISTANT



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JUL 16 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

July 16, 2018

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

Re: Raphael A. Wooden, #362178 v. State of South Carolina
Appellate Case No. 2017-000001
Lower Court Case No. 2015-CP-02-0579

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,

Julie A. Coleman
Assistant Attorney General
SC Bar No. 102214

JAC/ks
Enclosures

cc: Robert M. Dudek, Esquire (2 copies)