STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Deadra Jefferson, Circuit Court Judge

Appellate Case No. 2016-001456

ONRAE WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Did the Court of Appeals properly affirm the post-conviction relief (PCR) court's ruling that Counsel rendered effective assistance where both Counsel and the trial court explained to Petitioner that life without parole was the only possible sentence Petitioner could receive if convicted at trial?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Petitioner was indicted at the May 2005 term of the Charleston County Grand Jury for distribution of crack cocaine - third offense (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3592). App. pp. 77-78. Jason King, Esquire, represented Petitioner. App. pp. 1-2. Petitioner proceeded to trial on January 16-17, 2007, after which a jury found him guilty as indicted. App. pp. 160-384. The Honorable R. Markley Dennis, Jr., sentenced Petitioner to confinement for life without parole (LWOP) for each offense. App. pp. 383-84.

A timely Notice of Appeal was filed on Petitioner's behalf on January 25, 2007, and an appeal was perfected. App. pp. 492-96. Mark Peper, Esquire, represented Petitioner on appeal. App. p. 492. After full briefing by both sides, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Williams, 380 S.C. 336 (Ct. App. 2008). App. pp. 492-96. Petitioner's Petition for Rehearing was denied on December 19, 2008, and Petitioner's Petition for Writ of Certiorari to the South Carolina Supreme Court was denied by Order dated October 21, 2009. App. pp. 156, 497. The Remittitur was issued on October 26, 2009.

Petitioner filed an application for post-conviction relief (PCR) on May 11, 2010, and an amendment thereto on May 16, 2011. App. pp. 17-43, 386-401. Respondent made its Return on August 18, 2010, which was filed on August 20, 2010. App. pp. 44-47. An evidentiary hearing into the matter was convened on May 24, 2011, at the Charleston County Courthouse. App. p. 402. Petitioner was present at the hearing and represented by Elizabeth Scott Moise, Esquire, and Matthew E. Brown, Esquire. App. p. 402. Matthew Friedman, Esquire, of the South Carolina

Office of the Attorney General represented the Respondent. App. p. 402. Testifying at the hearing were the Petitioner; trial counsel (Counsel), Jason King; and appellate counsel, Mark Peper. App. p. 403. By Order dated August 1, 2011, the Honorable Deadra L. Jefferson denied and dismissed Petitioner's application with prejudice. App. pp. 1-9. Petitioner subsequently filed a Motion to Alter and Amend, and Respondent filed a Return to the motion. App. pp. 474-91. By Order dated August 31, 2011, Judge Jefferson denied the Petitioner's Motion to Alter and Amend. App. pp. 10-14. Petitioner filed a timely Notice of Appeal. The Court of Appeals granted the Petition for Writ of Certiorari by Order dated May 22, 2014. App. p. 533. On January 13, 2016, the Court of Appeals affirmed the PCR court's findings. App. pp. 589-91. Petitioner filed a Motion for Rehearing, which was denied on June 10, 2016. App. p. 608. Petitioner filed a Petition for Writ of Certiorari on two questions to this Court on July 16, 2016, and this Court granted the Petition on March 27, 2017, as to Question II.

STANDARD OF REVIEW

In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "This Court gives great deference to the post-conviction relief. . . court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). 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).

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 442, 334 S.E.2d at 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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 v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (citing Strickland, 466 U.S. at 690). Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An applicant must overcome this presumption in order to receive relief. Id., 300 S.C. at 118, 386 S.E.2d at 625. 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." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The Court of Appeals properly affirmed the PCR court's finding that Counsel's conduct was not deficient because Counsel properly advised and explained to Petitioner that life without the possibility of parole was the Petitioner's only possible sentence if convicted at trial when Counsel credibly testified he never indicated to Petitioner that the LWOP sentence would be anything but mandatory, Petitioner testified Counsel explained how his prior offenses could qualify him for LWOP, and Petitioner never indicated to the trial court that he was not aware the LWOP sentence was mandatory despite having the opportunity to do so.

Petitioner contends Counsel rendered ineffective assistance for failing to ensure Petitioner was aware an LWOP sentence was mandatory if convicted at trial, and said failure lead Petitioner to reject a favorable plea offer. The PCR court's ruling should be affirmed because there is probative evidence in the record to support the finding that Counsel rendered effective assistance. Criminal defendants are entitled to effective assistance of counsel during the plea bargaining process, even if the offer is ultimately rejected. Judge v. State, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). Additionally, failure by counsel to convey a plea offer to a criminal defendant constitutes deficient performance. Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009).[1] The standards of the American Bar Association provide defense counsel should "promptly communicate and explain. . . all plea offers made by the prosecuting attorney. . ., advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. . ." and "conclude a plea agreement only with the consent of the defendant." ABA Standards for Criminal Justice, *Pleas of Guilty*, §

[1] Although the rule in Davie was adopted in 2009, after Petitioner's conviction, the decision relies on precedent stretching back to the 1980s.

14-3.2 (3d ed. 1999). The Fourth Circuit, in Jones v. Murray, outlined the requirements for trial counsel during plea negotiations. 947 F.2d 1106, 1110-1111 (4th Cir. 1991). Trial counsel must notify the client of the plea offer, advise the client of the option to reject the offer and proceed to trial, discuss the probable outcomes of each option, and allow the client to make the ultimate decision as to how to proceed. Id. These rules make clear Counsel was required to convey all plea offers to Petitioner, to consult with Petitioner about available alternatives, and allow Petitioner to make the ultimate decision as to whether he would accept the plea offer(s) or proceed to trial. Id. at 1110-111. Counsel was not, however, required to ensure Petitioner fully understood the import of every piece of information Counsel conveyed to him.

While there are no South Carolina cases directly on point, the United States District Court for the District of Maryland has addressed a strikingly similar factual scenario and denied post-conviction relief where the defendant alleged he rejected a favorable plea offer because his trial counsel did not properly explain the difference between "life" and "mandatory life." Kratsas v. United States, 102 F.Supp.2d 320 (D. Md. 2000), aff'd, United States v. Kratsas, 9 Fed.Appx. 107 (4th Cir. 2001), cert. denied, 534 U.S. 929 (2001). In Kratsas, "petitioner took the stand on his own behalf and testified that he was never advised of the mandatory life sentence, instead, he stated, that it was his understanding that he *might* receive a sentence of life if convicted, but that the sentencing judge would have discretion in determining exactly what his sentence would be." Id. at 324. The district court found Mr. Kratsas's testimony credible, yet still found he failed to establish his trial counsel was deficient. Id. at 325.

In Kratsas, trial counsel "testified that he advised Kratsas of a mandatory life sentence, that he reviewed the statute that permits such a mandatory sentence, and that he advised petitioner that he was likely to be convicted if he went to trial." 102 F. Supp. 2d at 323-24. The

district court found although trial counsel "properly advised petitioner, petitioner did not understand the distinction between life and mandatory life." Id. at 324. Nonetheless, the district court held "there is no duty for an attorney to insure that his client understands all that he is told" and found "a client, who was properly advised but misunderstood such advice,. . ." still receives effective assistance of counsel. Id. at 325 (citing Jones, 947 F.2d at 1110).

At the evidentiary hearing in Petitioner's case, Counsel provided credible testimony that he had no problems communicating with Petitioner. Despite Petitioner's assertion he has a learning disability, no evidence of his diagnosis was introduced at the hearing, and Petitioner was able to understand and answer questions in a coherent way at both his trial and his PCR hearing. App. pp. 328-31, 383, 407-11. Counsel testified he advised Petitioner if he was served notice of the State's intent to seek life without parole and was subsequently convicted of a third strike, Petitioner could get life without parole.[2] App. pp. 425. Further, Counsel testified when explaining life without parole to Petitioner he "would have explained on the third strike you get life without parole" and "wouldn't have implied in any way that it was not a mandatory life without parole" sentence. App. p. 427. Petitioner testified Counsel explained to him how his prior convictions "could affect the State's ability to proceed under the life without parole statute." App. p. 410. Counsel also testified he advised Petitioner of the pros and cons of going

[2] Petitioner makes much of Counsel's use of conditional language in his testimony stating he told Petitioner the case "was possible life without parole," the penalty was "up to life," and he advised Petitioner "if they served notice on him, then he could get life without parole." See Brief of Petitioner, p. 12. However, in the full context of Counsel's testimony, it is clear he was testifying about discussions he had with Petitioner in May 2006, months prior to the LWOP notice actually being served by the State, and Counsel was accounting for the possibility of acquittal at trial. App. pp. 425, 473.

to trial versus pleading guilty, and Counsel urged Petitioner to accept the plea offer because the risk was "very high" if he went to trial.[3] App. p. 425.

Additionally, the trial court made repeated comments throughout Petitioner's trial about the mandatory nature of the LWOP sentence Petitioner was facing. Assuming, *arguendo*, Counsel's performance was deficient, any alleged deficiency was cured by the trial court's comments during Petitioner's 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). The following exchanges took place before Petitioner's trial, while Petitioner was present in the courtroom:

> The Court: Thank you sir. You all made that call. Did you offer something other than life without parole?
> Solicitor: Yes, sir we did.
> The Court: That being the case, **you've made your choice**. If he is going to be burned he'll be burned. No question about that. Okay. Thank you very much.

App. pp. 175-76 (emphasis added).

> 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). Moreover, after Petitioner was convicted but prior to sentencing, the trial court addressed Counsel and petitioner:

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[3] Again, Petitioner attempts to use this language as evidence Counsel did not properly understand and advise Petitioner of the mandatory nature of the LWOP sentence if convicted. Brief of Petitioner, p. 12. However, an equally plausible reading of Counsel's full answer is that Counsel was accounting for the possibility, however slim, that Petitioner could be acquitted at trial. App. p. 425.

> The Court: The reviewing Court—**you're correct, mine is without any discretion**, but clearly this case, the facts observed, and the fact of recent convictions, -- there was a gentleman this morning that entered a plea to avoid. I think that he finally perceived the gravity of the situation; unfortunately some don't, and Mr. Williams falls into that.

App. p. 382 (emphasis added).

The trial court's comments before the start of Petitioner's trial and during Petitioner's sentencing proceeding clearly show Petitioner was made aware of the mandatory nature of the LWOP sentence. On appeal, Petitioner attempts to discount the statements of the trial court because the statements were not directed at Petitioner, but rather at Counsel. Brief of Petitioner, pp. 4-5. The transcript, however, reflects Petitioner was present in the courtroom when the statements were made, and there is nothing in the record to indicate Petitioner did not hear the comments. Moreover, at least one comment does appear to be directed at Petitioner – "you've made your choice," and the trial court clearly stated all plea offers would expire when the jury was sworn and LWOP would be the only available sentence. App. pp. 175-76, 179. The transcript indicates the trial court's warning to Petitioner that LWOP would be the only sentence was made immediately following off-the-record plea negotiations. App. p. 176. Further, Petitioner spoke during his sentencing proceeding and never indicated he was unaware LWOP was mandatory. App. p. 383. In fact, Petitioner indicated he did not think his *family* understood what was happening, but never stated *he* did not understand. App. p. 383. "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences..." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

Crucially, the PCR court found Counsel's testimony to be credible, while also finding Petitioner's testimony was not credible. App. p. 6. This Court must give great deference to the PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267,

270, 701 S.E.2d 738, 739 (2010). See also Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (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."). Counsel's credible testimony that he conveyed all plea offers to Petitioner, advised Petitioner of the risk of proceeding to trial, and informed Petitioner LWOP was mandatory upon notice from the State and conviction for a third strike, is sufficient to support the PCR court's finding that Petitioner failed to carry his burden of proving Counsel did not properly advise him of the mandatory nature of LWOP.

Petitioner has failed to carry his burden of proving counsel was ineffective for failing to advise Petitioner of the mandatory nature of the life without parole sentence he was facing if convicted at trial because Petitioner cannot show Counsel's performance was deficient. This Court should affirm the Court of Appeals affirmation of the PCR court's denial of post-conviction relief.

CONCLUSION

For the reasons stated above, this Court should affirm the rulings of the Court of Appeals and the PCR court.

{Signature on following page.}

Respectfully submitted,

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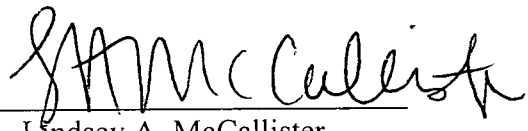
BY: 
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ATTORNEYS FOR RESPONDENT

June 6, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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