STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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AUG 29 2018
S.C. SUPREME COURT

Appeal from Florence County
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2018-000020

Kelvin O'Neal,

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

I. Is there probative evidence in the record to support the PCR court's finding Petitioner enter into the guilty plea freely and voluntarily where Petitioner understood the sentencing range was zero to fifteen years, the State was not making any recommendation as to a sentence within that range, and plea counsel never promised him a specific sentence, and where Petitioner understood and agreed with this strategy in an attempt to receive a probationary sentence?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Petitioner was indicted at the April 2010 term of the Florence County Grand Jury for one count of possession with intent to distribute (PWID) cocaine base and resisting arrest (2010-GS-21-0467). App. pp. 82-83. Petitioner was also indicted at the July 2012 term for one count of accessory after the fact of murder and conspiracy (2012-GS-21-0899). App. pp. 84-85. Petitioner was represented on these charges by Chevron Scott, Esquire. App. p. 1. Solicitor Clements prosecuted the case on behalf of the State. App. p. 1. On July 16, 2014, Petitioner pleaded guilty before the Honorable Michael G. Nettles to the PWID and accessory charges. App. pp. 1-2. The remaining charges were dismissed. App. pp. 3-4. Judge Nettles sentenced Petitioner to concurrent terms of twelve years' imprisonment for PWID cocaine base and accessory after the fact of murder. App. pp. 16-17. Petitioner did not file an appeal. App. p. 72.

Petitioner filed an Application for Post-Conviction Relief (PCR) on November 3, 2014, raising multiple allegations of ineffective assistance of counsel. App. pp. 19-25. Respondent made its Return on September 16, 2016. App. pp. 26-29. An evidentiary hearing into the matter was convened on March 14, 2017, at the Florence County Courthouse before the Honorable Paul M. Burch. App. p. 30. Jonathan Waller, Esquire, represented Applicant. App. p. 30. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. App. p. 30. At the hearing, Petitioner abandoned all issues except the claim he did not fully understand the sentence he was facing when he agreed to plead guilty, either because plea counsel failed to inform the plea court of the State's offer correctly on the record, or alternatively, he was induced to reject the offer due to plea counsel's ineffective assistance. App.

pp. 33-34. Petitioner testified on his own behalf at the hearing. App. p. 31. Cheveron T. Scott, Esquire (Counsel), and Solicitor Ed Clements, who prosecuted the case, also testified. App. p. 31. The PCR Court also had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, and the plea transcript. App. p. 71. The PCR court found Petitioner received effective assistance of counsel, and the plea was entered into freely and voluntarily and dismissed Petitioner's application. App. pp. 76-79.

Petitioner filed a Petition for a Writ of Certiorari to this Court, along with an Appendix, on May 14, 2018. This Return to the Petition for a Writ of Certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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.

STATEMENT OF THE FACTS

On September 1, 2009, Petitioner's cousin, Fonnelze Delane (Delane), set in motion the murders of Billy Hall and Tanya Poston, who Delane believed were going to testify against him in a pending drug case. App pp. 5-6, 11. Delane originally contracted for the murder with Petitioner's codefendant, Laross Graham (Graham). App. p. 5. Graham and another codefendant, Montez Barker (Barker), shot the two victims and left them lying on the roadside in Florence County. App. pp. 5-6. Graham and Barker then hid the victims' car and set it on fire. App. p. 6. Graham was then picked up by Petitioner's fourth codefendant, Anthony Wingate (Wingate), who dropped Graham off at Delane's music studio. App. p. 6. Delane then sent Petitioner to pick up the money to pay Graham and bring it back to the studio, which Petitioner did. App. p. 6. According to Wingate, Petitioner was aware of the circumstances of the payment to Graham at the time. App. p. 6.

On October 7, 2009, while law enforcement was investigating the murders, a search warrant was executed on Delane's residence while Petitioner was present. App. p. 7. Upon seeing police officers approach, Petitioner ran, and officers observed him thrown down several bags of drugs. App. p. 7. The bags were tested and determined to contain crack cocaine in an amount sufficient for use in distribution. App. p. 7.

ARGUMENT

Petitioner asserts Counsel rendered ineffective assistance during the guilty plea, and the plea was not knowingly and voluntarily entered. Specifically, Petitioner contends Counsel was ineffective either because Counsel failed to inform the plea court of the State's offer correctly on the record, or alternatively, because Petitioner was induced to reject the offer due to Counsel's ineffective assistance.

There is probative evidence in the record to support the PCR court's finding Petitioner enter into the guilty plea freely and voluntarily where Petitioner understood the sentencing range was zero to fifteen years, the State was not making any recommendation as to a sentence within that range, and Counsel never promised him a specific sentence. Further, Petitioner understood and agreed with Counsel's strategy in order to try for a probationary sentence.

Petitioner contends Counsel was ineffective because he "advis[ed] Petitioner that if he pled guilty. . . without recommendation he would probably get probation," but instead, Petitioner received a twelve-year sentence. PWC p. 3.

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe, 345 S.C. at 20, 546 S.E.2d at 419. An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. Further, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and

defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

"A guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is generally foreclosed. Dalton, 376 S.C. at 137-38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

At the evidentiary hearing, Petitioner testified the State first extended a plea offer for ten years, which he rejected because a codefendant, whom he felt was more culpable than himself, had received only probation. App. p. 37. Petitioner testified the State then extended an offer of seven years, which he discussed with Counsel. App. p. 38. Petitioner testified he felt seven years was "an okay number," but he still wanted to try for a probationary sentence because he had no previous convictions, and his codefendant had just been sentenced to probation. App. p. 39. Petitioner further testified, after Counsel discussed the situation with the solicitor, Counsel told Petitioner the best chance he had at receiving probation was if Petitioner pleaded guilty without a recommendation from the State. App. pp. 39-40. Although Petitioner testified he believed the seven-year offer could still be available, he acknowledged he knew the sentencing range was

zero to fifteen years, and he never informed the judge at any point during the plea of his belief he would only receive up to seven years. App. pp. 40, 42-44.

In fact, Petitioner explicitly testified he understood the terms of the agreement were that "[the solicitor] said he's not going to tell the judge to give me probation, he's not going to tell the judge *not* to give me probation, it would be up to the judge." App. p. 41 (emphasis added). Importantly, at one point, Petitioner testified he probably would not have gone to trial even if no plea offer had been made. App. p. 45. Petitioner also clearly testified Counsel did not promise or guarantee he would receive a sentence of seven years or less, and although according to Petitioner, he believed he had a "95% chance" of receiving probation, he was aware the judge could in fact sentence him to *more* than seven years. App. pp. 45-48 (emphasis added).

Counsel testified he felt strongly that Petitioner was a good candidate for probation because while he was released on bond prior to the guilty plea, he stayed out of trouble and had been working and volunteering in the community. App. pp. 50-51. Counsel testified he sent Solicitor Clements a letter arguing for probation, and the Solicitor offered to let Petitioner plead without a recommendation so Counsel could make those arguments to the judge. App. p. 51. Counsel further testified he believed if the State recommended seven years, that is what the judge would impose because, in his experience, judges often accept whatever the State asks for. App. p. 51. Counsel testified he felt the best way to obtain a lower sentence was to plead without recommendation, and he explained that recommendation to Petitioner. App. pp. 51-52. Counsel also testified he explained Petitioner could receive anywhere between zero and fifteen years, but Counsel believed Petitioner expected to get less than seven years, even though he knew, logically, he could receive more. App. pp. 52-53, 58-59. Counsel testified he now feels he did not properly prepare Petitioner for a sentence of twelve years, and he was taken aback by it

himself. App. pp. 52-53. However, Counsel also testified he did not promise or guarantee Petitioner a specific sentence because he did not believe it would have been ethical for him to do so. App. p. 54.

Counsel further testified he gave a lengthy argument in mitigation asking for probation, and while he believed the Solicitor presented the facts of the case fairly, either he or the Solicitor should have informed the judge that one codefendant received probation for similar charges. App. p. 55. However, Solicitor Clements also testified and explained Petitioner and Wingate, the codefendant who received a probationary sentence, were not similarly situated because Wingate rendered substantial assistance to the State in the prosecution of the remaining codefendants. App. pp. 62, 64-65. Solicitor Clements testified he did not believe the State made a recommendation in the codefendant's case either, but he explained the extent of the codefendant's cooperation, and the judge sentenced him to probation. App. p. 66. Here, although the State approached Petitioner about cooperating with the investigation, Petitioner chose not to because he was scared. App. p. 63. Solicitor Clements testified he agreed to simply recite the facts of the case and allow Counsel to see if he could convince a judge to give Petitioner a lower sentence than the seven years offered. App. pp. 63-64.

Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. This Court has repeatedly warned

the PCR court must be wary of second guessing counsel's trial tactics, and where counsel articulates a valid reason for employing a specific strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Further, the United States Supreme Court admonished in Strickland "that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made." 466 U.S. at 689.

In this case, Counsel clearly articulated a "calculated" strategic reason for advising Petitioner to plead guilty without a recommendation – he felt it was the only way Petitioner had a chance at receiving a probationary sentence, which was Petitioner's stated goal. App. pp. 51, 55-56. Petitioner's own testimony confirms he understood the strategy and agreed with it. App. pp. 39-41. Simply because the strategy did not work out as Petitioner and Counsel hoped does not make Counsel's advice unreasonable or his performance deficient to the point of constituting ineffective assistance.

Petitioner's case is analogous to the situation in Griffin v. State, 361 S.C. 173, 604 S.E.2d 394 (2004), in which this Court found plea counsel rendered effective assistance in similar circumstances. There, this Court explained:

> While counsel told [Petitioner] the plea court had indicated he would likely give [Petitioner] a sentence comparable to [the codefendant's] twenty-two year sentence, counsel made no promises. He also informed [Petitioner] there were no plea negotiations and informed him of the possible range of sentences. Further, the plea court informed [Petitioner] of the maximum sentences he could receive for the charges prior to [the] plea being entered. The plea court also asked [Petitioner] whether he understood there were no promises made regarding his guilty plea. [Petitioner's] answers to those questions reflect an awareness of the potential range of sentences and an understanding that he had not been promised anything in return for his guilty plea. Accordingly, counsel's performance was not deficient even though he related his belief to [Petitioner] that the court would give a twenty-two year sentence instead of the thirty years respondent received.

Id. at 177, 604 S.E.2d at 396. Furthermore, "[w]ishful 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," as Petitioner did here. Wolfe, 326 S.C. at 165, 485 S.E.2d at 371; see App. pp. 3, 9-10, 58. See also State v. Cantrell, 250 S.C. 376, 380, 158 S.E.2d 189, 191-92 (1967) ("The accused and his counsel were presumed to know that probation was a matter wholly within the discretion of the court, and they had no right to assume the result of the exercise of that discretion. An accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilty with the right to retract it if he finds that his expectation was not realized.").

Accordingly, the PCR court correctly found Counsel employed a valid strategy in seeking a probationary sentence for Petitioner, and therefore, Counsel's performance was not deficient. The PCR court also correctly found Petitioner was not prejudiced because it credited Petitioner's candid testimony that he likely would not have wanted to take his case to trial even if the State had made no offers whatsoever. As detailed above, there is abundant probative evidence in the record, including Petitioner's own testimony, Counsel's testimony, and the record of the plea hearing, to support the PCR court's finding the plea was entered into knowingly and voluntarily.

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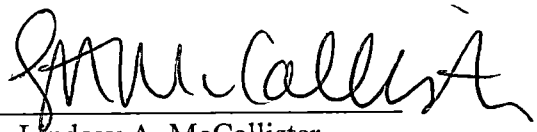
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not ineffective and Petitioner's guilty plea was freely and voluntarily given. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
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Kelvin O'Neal,

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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 delivering two (2) copies via interagency mail, to:

Robert M. Pachak, Esquire
SC Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 29th day of August, 2018

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

August 29, 2018

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

Re: **Kelvin O'Neal v. State of South Carolina**
Appellate Case No. 2018-000020
Lower Court Case No. 2014-CP-21-3100

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,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/cc
Enclosures

cc: Robert M. Pachak, Esquire