STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO MARLBORO COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2017-002630

George A. Cousins,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny post-conviction relief where plea counsel denied promising Petitioner he would receive a 15 year sentence in exchange for pleading guilty?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. Petitioner was indicted at the January 2011 term of the Marlboro County Grand Jury for murder (2011-GS-34-00050). J. Richard Jones, Esq. represented Petitioner on the charges. Kelly W. Hall, Esq., and Heather S. Weiss, Esq., of the South Carolina Attorney General's Office, prosecuted the case. On May 24, 2012, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter, and to the weapon charge as indicted. The Honorable Paul M. Burch sentenced Petitioner to imprisonment for concurrent terms of 30 years for voluntary manslaughter, and 5 years for the weapon charge.

After the imposition of Petitioner's sentence, Jones filed a motion to reconsider on Petitioner's behalf. After the filing of the motion, but prior to the hearing thereon, Stuart M. Axelrod, Esq., substituted for Jones as counsel. Petitioner proceeded to a hearing before Judge Burch on April 8, 2013. Axelrod represented Petitioner, and Ashley A. McMahan, Esq., of the South Carolina Attorney General's Office, represented the State. The Court granted Petitioner's motion in part, and reduced his sentence for voluntary manslaughter from 30 to 27 years on May 17, 2013. Reconsideration for the weapons conviction was denied at that time. Petitioner did not appeal his plea or sentence.

Petitioner filed his application for post-conviction relief on May 12, 2014 (2014-CP-34-00127). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that:
    a. Counsel "assured" Petitioner that he would receive a fifteen year sentence;
2. Involuntary guilty plea, in that:
    a. Petitioner waived his right to a jury trial based on Counsel's "assurance" that he would receive a fifteen year sentence; and
3. Violation of due process.

Respondent made its return on or about December 5, 2016, and an evidentiary hearing into the matter was convened on July 18, 2017, before the Honorable Roger E. Henderson. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, represented Respondent. By written order dated November 16, 2017, and filed December 13, 2017, Judge Henderson denied and dismissed the application.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

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; 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 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, 686 (1984); Butler, 286 S.C. at 442, 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. Strickland, 466 U.S. at 687. "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, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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. 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. Strickland, 466 U.S. at 696. 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. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE DENIAL OF RELIEF MUST BE UPHELD BECAUSE PLEA COUNSEL'S DENIAL CONSTITUTES "ANY EVIDENCE," AND BECAUSE THE CREDIBILITY OF THE WITNESSES IS A DETERMINATION FOR THE PCR COURT, NOT THE APPELLATE COURT.

This matter is resolved entirely by the standard of review and appellate deference to the lower court's findings of fact, which properly relied upon the credible testimony of plea counsel J. Rick Jones ("Jones") in explaining the surprising claims of post-plea counsel Stuart Axelrod ("Axelrod").

During the plea proceeding, the plea court asked Jones if he discussed with Petitioner the charges, possible punishment, and elements of the offenses he was pleading to, to which Jones replied that he had and that Petitioner understood, which Petitioner confirmed. (Appx. 5, ll. 11-20). The plea court nonetheless read the indictment and explained voluntary manslaughter carried a sentence of up to 30 years. (Appx. 5-6; Appx. 109). Petitioner denied being promised anything. (Appx. 8, ll. 21-24). There was no agreed upon recommendation and the State clearly indicated at the outset that it would be asking for the maximum sentence. (Appx. 4, ll. 17-19). Petitioner got the maximum sentence for voluntary manslaughter, but not the maximum possible, as Judge Burch ran the sentences concurrent, rather than consecutive. (Appx. 34, ll. 2-8). At the reconsideration hearing, Axelrod made no mention on the record of any promise by Jones, nor did he indicate Petitioner's guilty plea was involuntarily entered—Axelrod only asked for mercy. (Appx. 39-40).

At the PCR evidentiary hearing, Petitioner testified he was told he was offered "a one time deal for fifteen years for all the charges[,]" that he thought he would receive 15 years, and that had he known that he would not receive 15 years, he would have insisted on going to trial.

(Appx. 70, ll. 4-5; Appx. 70-71; Appx. 76, ll. 17-24; Appx. 78-79). Petitioner was "shocked" by the sentence. (Appx. 71-72).

Jones denied promising Petitioner a 15 year sentence and explained the potential source of confusion:

> Where I believe Mr. Cousins may have got confused is I explained to him what my understanding of how the trial judge was going to handle his plea. Judge Burch was the trial judge and I've practiced in front of Judge Burch for longer than I'd like to admit but probably twenty to twenty-five years. He has told various defense counsel on the record how he handles pleas, particularly, straight up pleas. And my understanding of that is what I explained to Mr. Cousins and that is, you start with the maximum sentence, you cut it in half, and then you go up or down based on either mitigation or aggravation, good things or bad things he hears. And I had that conversation with Mr. Cousins many times.

(Appx. 85, ll. 1-14). Jones reaffirmed PCR counsel's simplification and opined that Petitioner understood the explanation. (Appx. 85-86). Jones confirmed he discussed the case with Axelrod upon discovering his retention by Petitioner, but the conversation focused on lack of preparation, not the expected sentence, and Jones denied telling Axelrod he'd ever expected or thought Petitioner would get a 15 year sentence. (Appx. 89, ll. 3-17).

Axelrod recalled Petitioner told him Jones had promised a sentence of 15 years. (Appx. 93-94). Axelrod then recalled conversing with Jones in the hallway before the reconsideration hearing:

> And I went out into the hallway and I was directed to where Mr. Joens was and I said, "Mr. Jones, Mr. Cousins tells me that you told him that if he pled guilty he would get fifteen years." Mr. Jones told me, "he did." And I said to myself, damn, [Petitioner] is telling me the truth. Now at that point I went into chambers, Judge Burch was there and the Attorney General was there and I said, "you know, we have a little problem." I said, "I believe that he was promised the fifteen years," and Judge Burch, went like that, he just kind of shook his shoulders. And I myself in twenty years have not been in a situation like that and, you know, I had to do what I had to do and I told the judge I said, "you know, if we don't fix this, we're going to have a PCR someday."

(Appx. 94-95). Axelrod asserted his request for 15 years was not arbitrary, but dictated by the purported promise by Jones to Petitioner that he would receive 15 years. (Appx. 95, ll. 2-12). Axelrod thereafter expressed his opinion Petitioner was telling the truth.[1] (Appx. 95, ll. 12-24). Axelrod complained "I really don't want to be here." (Appx. 95, ll. 23-24).

Jones returned to the stand and went into greater detail of his recollection of his conversation with Axelrod. (Appx. 96-97). Jones again denied promising Petitioner he would receive 15 years, or that he told anybody as much, but that Petitioner must have gotten the 15 year figure from Jones' effort to explain Judge Burch's sentencing process. (Appx. 97, ll. 8-18). Jones firmly asserted Petitioner did not plead guilty due to a promise, because there was no such promise. (Appx. 97, ll. 22-23).

The PCR court is entitled to *great* deference in its findings where matters are credibility are involved, as only the PCR court enjoyed the opportunity to directly observe the witnesses. Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). This case is precisely why—the entire matter turns on the credibility of the three witnesses. Jones testified, and the PCR court found Jones testified credibly in his denials. That alone is adequate to sustain the denial of relief.

However, Petitioner's protestation that Axelrod "had no dog in the fight" deserves special attention. Axelrod assisted in the filing of the application for relief. (Appx. 47, question 18(a)(ii), (b)(ii)). The application was originally filed for Petitioner by attorney Tristan Shaffer, Esq., who worked in the employ of Axelrod's firm at or around the time the application was filed. (Appx. 44-52); South Carolina Bar Lawyers Desk Book 404 (2014-2015 ed.). Petitioner calls upon this Court to reject the sound credibility determination of the PCR court in favor of

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[1] The undersigned regrettably failed to object to Axelrod's impermissible bolstering, but it appears to not have been properly disregarded by the PCR court.

the testimony of the attorney who assisted in the filing of the PCR. That position is unsupported by the law and, to be frank, is absurd.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
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21 Sept., 2018

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GEORGE A. COUSINS,

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **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:

Victor R. Seeger, Esquire
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201

This 21st day of September, 2018.

MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

September 21, 2018

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

RE: **George A. Cousins v. State of South Carolina**
Appellate Case No. 2017-002630
Lower Court Case No. 2014-CP-34-0127

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Victor R. Seeger, Esquire