

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 17 2018

S.C. SUPREME COURT

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

Appellate Case No. 2017-002097

James E. Murphy,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONDENT’S QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....4

STATEMENT OF THE FACTS.....6

ARGUMENT.....8

 There is probative evidence in the record to support the PCR court’s finding Petitioner entered into the guilty plea freely and voluntarily where Petitioner understood the sentencing range was zero to thirty years for kidnapping and ten to thirty years for armed robbery; the State was not making any recommendation as to a sentence within that range; and plea counsel never promised him a specific sentence. Further, Petitioner not only understood, but directed this strategy in order to try for a sentence below the twenty-five year term offered by the State8

CONCLUSION.....14

RESPONDENT'S QUESTION PRESENTED

Is there probative evidence in the record to support the PCR court's finding Petitioner entered into the guilty plea freely and voluntarily where Petitioner understood the sentencing range was zero to thirty years for kidnapping and ten to thirty years for armed robbery; 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 directed this strategy in an attempt to receive a sentence less than the twenty-five year term offered by the State?

STATEMENT OF THE CASE

James E. Murphy (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In June 2012, the Florence County Grand Jury indicted Petitioner for armed robbery, kidnapping, conspiracy, and possession of a weapon during the commission of a violent crime (2012-GS-21-788). Michael T. Miller, Esquire, represented Applicant. On February 15, 2013, Petitioner pleaded guilty to armed robbery and kidnapping. In exchange for his plea, the State dismissed the remaining charges. The Honorable William H. Seals, Jr., sentenced Petitioner to concurrent terms of twenty-eight years for armed robbery and kidnapping. On February 21, 2013, Petitioner made a motion to reconsider his sentence. Judge Seals convened a hearing on the motion on May 22, 2013 and denied the motion by written order filed June 11, 2013. Petitioner did not further appeal his guilty plea or sentence.

Petitioner filed an Application for Post-Conviction Relief (PCR) on July 19, 2013, raising multiple allegations of ineffective assistance of counsel. Respondent made its Return on May 6, 2014. An evidentiary hearing into the matter was convened on March 15, 2017, at the Florence County Courthouse before the Honorable Paul M. Burch. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner argued his guilty plea was not freely and voluntarily entered because Counsel gave erroneous advice as to the details and content of the plea agreement.

Petitioner testified on his own behalf at the hearing. Michael T. Miller, Esquire (Counsel) testified for the State via Skype videoconference. 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. The PCR court found Petitioner received effective assistance of counsel, and the plea was entered into freely and voluntarily and dismissed Petitioner's application.

Petitioner filed a Petition for a Writ of Certiorari to this Court, along with an Appendix, on May 29, 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), SCRPC; 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).

STATEMENT OF THE FACTS

On February 3, 2012, the victim, Hakeem Adams (Adams), traveled from Marion to Florence to attend a basketball game at South Florence High School. App. p. 7. Adams's car was specially painted with a Cinnamon Toast Crunch theme, and Adams had added special, expensive rims. App. p. 7. After the game, Adams went to a McDonald's and then to a Markette service station, where he noticed another vehicle, a gray car, seemed to be following him. App. p. 8. Petitioner got out of the gray car at the service station, and Adams was able to catch a glimpse of Petitioner's face. App. p. 8. When Adams left the Markette, the gray vehicle, in which Petitioner was riding in the front passenger seat, resumed following Adams. App. p. 8.

Adams drove to the home of his children's mother and told her he thought he was being followed. App. pp. 8-9. Adams eventually decided to return to this car in the parking lot of the apartment complex to attach an anti-theft device. App. p. 9. Petitioner and a codefendant then approached Adams at gunpoint and ordered him into the back seat of his car. App. p. 9. Petitioner took the keys and drove off, with the codefendant holding Adams at gunpoint in the back. App. p. 9. Petitioner and the codefendant drove Adams' car to a gas station near the interstate, took Adam's credit card to put gas in the car, and then drove off again toward Dillon County. App. p. 10.

Eventually, Petitioner stopped the car near an abandoned building in Dillon County and led Adams at gunpoint to the wall of the building. App. p. 10. Petitioner shot three times, and Adams played dead until Petitioner returned to the car and drove off. App. pp. 10-11. None of the shots hit Adams. App. p. 10. Adams eventually got up and ran to a neighboring house where he was able to contact the Dillon Police Department and report the crimes. App. p. 11. In the

meantime, Adams' cousin, who was aware Adams had been kidnapped a short time earlier,¹ spotted the distinctive car and began following it south on I-95 while directing police to its location. App. p. 11. Law enforcement responded and pulled over the vehicle. App. p. 12. Petitioner and his codefendant then engaged in a shootout with police, during which the codefendant escaped, and Petitioner was arrested. App. p. 12. Petitioner eventually gave a statement confessing to his involvement in the crimes. App. p. 12.

¹ Unbeknownst to Adams or Petitioner, two children in the apartment complex witnessed the kidnapping and reported it to their caregiver, who in turn notified law enforcement. App. p. 12.

ARGUMENT

Petitioner asserts Counsel rendered ineffective assistance such that his plea was not knowingly and voluntarily entered. Specifically, Petitioner contends Counsel was ineffective because Counsel promised him a fifteen-year sentence if he pleaded guilty, and Petitioner instead received twenty-eight years. PWC p. 3.

The PCR Court correctly found Petitioner entered into the guilty plea freely and voluntarily where Petitioner understood the sentencing range was zero to thirty years for kidnapping and ten to thirty years for armed robbery; the State was not making any recommendation as to a sentence within that range; and Counsel never promised him a specific sentence. Further, Petitioner not only understood, but directed this strategy in order to try for a sentence of less than the twenty-five year term offered by the State.

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 pleaded 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 extended a plea offer for a negotiated twenty-five year sentence, which he rejected. App. p. 45. Petitioner Counsel then told him he could get between ten and fifteen years, if Petitioner would agree to plead guilty in Marion County as soon as possible. App. p. 47. However, Petitioner then testified when he arrived in Marion County, Counsel told him he “would be going in front of the judge on an open plea because the State still had the twenty-five year offer on the line, but going in front of the judge on an open plea, we could get the ten-to-fifteen [years].” App. p. 48. Petitioner also testified that although he thought he was going to receive ten-to-fifteen years, he understood the State still wanted him to receive twenty-five, and he never asked Counsel any further questions about the agreement. App. pp. 48-49.

On cross-examination, Petitioner admitted Counsel never framed the ten-to-fifteen years as an offer from the State, and “when [he] went into the courtroom, it was just an open plea.” App. p. 53. Petitioner further conceded the plea judge told him he could actually receive between

zero to thirty years for the kidnapping charge and ten and thirty years for the armed robbery charge. App. p. 54. Although Petitioner insisted Counsel had promised him between ten and fifteen years, Petitioner conceded he never told the plea judge his understanding of the sentencing range or informed the judge that was the basis of his agreement to enter the plea. App. pp. 54-55.

Counsel testified he met with Petitioner several times prior to the plea to discuss Petitioner's version of events and a strategy for handling the case. App. p. 64. According to Counsel, they came to the conclusion early on in these discussions that Petitioner likely would not prevail at trial, so the focus of their case preparation was on developing mitigation arguments, particularly the argument Petitioner deliberately aimed the shots to miss the victim because he was only a reluctant participant in the crime. App. pp. 64-66. Because there was some evidence to support Petitioner's position, Counsel testified both he and Petitioner felt a negotiated twenty-five year sentence was excessive, and "a major point of discussion at all of our meetings was [the] twenty-five year negotiated sentence and how we could work around that to do better, how we could beat that twenty-five [year sentence]." App. pp. 66-67.

Counsel further testified in detail as to how Petitioner's plea came about. According to Counsel, he met with Petitioner in December 2012 to lay out what he saw as Petitioner's four options: (1) accept the plea offer of a twenty-five year negotiated sentence; (2) work to get the State to agree to a recommendation rather a negotiated sentence; (3) enter a "straight-up" plea to all four charges and argue for whatever sentence Petitioner wanted, or (4) take the case to trial. App. pp. 68-69. Counsel explained it was obvious by January 2013 the State was not going to agree to a recommendation rather than a negotiation, so the case was set for trial, and Counsel began preparing accordingly. App. pp. 69-70. Counsel testified he met with Petitioner on

February 6, 2013, at which time he informed Petitioner his case was scheduled for trial before Judge Craig Brown during the March term. App. p. 70.

According to Counsel, Petitioner was “unequivocal” that he did not want to be tried in front of Judge Brown because Judge Brown had a reputation among the inmates for being unpredictable and sometimes harsh with criminal defendants. App. pp. 70-71. Counsel testified Petitioner told him, “I would rather plead to all four [charges] than try it in front of Judge Brown.” App. p. 71. As a result of Petitioner’s request, Counsel and the assistant solicitor arranged to present Applicant’s plea to Judge Seals in Marion County instead. App. p. 71. Counsel testified he never made Petitioner any promises as to what his sentence would be, although they discussed fifteen years as a “target” since Petitioner’s codefendant had received twenty years, and they were arguing Petitioner was less culpable than the codefendant. App. pp. 67, 72. Counsel repeatedly testified Petitioner made the decision to plead guilty because he did not want to risk a trial in front of Judge Brown. App. pp. 70-71, 80. Notably, the PCR court found Counsel’s testimony credible and Applicant’s testimony to be incredible.² App. p. 101. Such a determinations are to be given great deference by this Court. See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)) (explaining this Court “gives great deference to a PCR judge’s findings where matters of credibility are involved”).

² Petitioner argues Counsel’s testimony is unreliable because he testified incorrectly “several times” at the evidentiary hearing, most notably when he said the victim gave an impassioned statement at the plea hearing. PWC p. 4. However, Counsel later clarified his testimony and admitted he might have been confused as to whether the victim spoke at the plea or at the hearing on Petitioner’s motion for reconsideration, as Counsel did not have a transcript in front of him while he was answering questions. App. p. 85. In any event, the PCR court heard this testimony when Petitioner’s PCR counsel pointed out the error and still found Counsel’s testimony credible overall.

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 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 valid reason for advising Petitioner to plead guilty without a recommendation – they were trying to achieve a sentence of less than twenty-five years. App. p. 72. 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. Moreover, it is clear from Petitioner’s own testimony at the evidentiary hearing Petitioner knew this was a “straight up” plea at least when he arrived in Marion County and spoke with Counsel prior to the adjudication. App. p. 48.

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 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 was not deficient as he followed Petitioner's instructions with a stated goal of achieving a better sentence than offered by the State, and Petitioner chose to plead guilty freely and voluntarily, with full knowledge of the potential penalties pursuant to a plea without any recommendation or negotiation. App. pp. 101-102. 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.

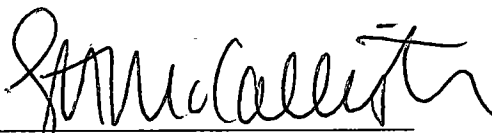
CONCLUSION

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,

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October 17, 2018

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
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S.C. SUPREME COURT

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JAMES MURPHY,

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STATE OF SOUTH CAROLINA,

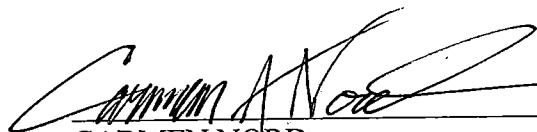
Respondent.

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:

Mr. Victor R Seeger
1330 Lady Street
Suite 401
Columbia, SC 29201

This 17th day of October, 2018



CARMEN NORD
Legal Assistant



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

OCT 17 2018

October 17, 2018

S.C. SUPREME COURT

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

Re: James E. Murphy v. State of South Carolina
Appellate Case No. 2017-002097
Lower Court Case No. 2013-CP-21-1889

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 McCallister
Assistant Attorney General
SC Bar No. 79054

LM/can
Enclosures

cc: Victor R. Seeger, Esquire (2 copies)