STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas
The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-002508

KIRK WILLIS,

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 STATEMENT OF THE ISSUE

Did the post-conviction relief court properly determine trial counsel was not constitutionally ineffective in advising Petitioner on the potential sentence he faced prior to entering a guilty plea?

STATEMENT OF THE CASE

Petitioner is **not** presently in the South Carolina Department of Corrections.[1] During the October 2015 term, the Laurens County Grand Jury indicted Kirk Willis (Petitioner) for two counts of attempted murder (2015-GS-30-1735, 1738), two counts of criminal domestic violence (2015-GS-30-1737,1734), and possession of a weapon during the commission of a violent crime (2015-GS-30-1739). Petitioner was initially represented by Chelsea McNeill, Esquire, and later by Bryan Able, Esquire, both of the Eighth Circuit Public Defender's Office. Ultimately, Petitioner was represented by Aaron Taylor, Esquire (hereinafter Counsel). Assistant Solicitor Warren Mowry of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On November 3, 2015, Petitioner appeared before the Honorable Frank R. Addy, Jr. and pled guilty to first degree assault and battery (non-violent) as a lesser included offense of attempted murder. During the guilty plea hearing, the State called the case and explained to Judge Addy that the State was recommending a five year sentence. (Appx. 3.) Petitioner agreed with the State's summary of the facts and testified he was pleading guilty because he was guilty of the charge. (Appx. 6.) Judge Addy informed Petitioner that first degree assault and battery carries up to a ten year sentence. (Appx. 4.) Judge Addy asked Petitioner, "[A]side from the recommended five year sentence has anyone promised you anything else?" (Appx. 9.) Petitioner replied, "No, sir." Counsel clarified that the sentence is to run concurrent with Petitioner's probation revocation sentence. (Appx. 9.) Counsel explained to the court that Petitioner should receive credit for five-hundred and eighty-eighty days. (Appx. 11.) The State calculated Petitioner should only receive credit for four-hundred and fifty-two days. (Appx. 11.)

[1] According to the South Carolina Department of Corrections, Petitioner was released December 28, 2016.

Counsel indicated his calculate was higher because he was giving Petitioner credit for over one-hundred days he spent on probation. (Appx. 11.) The balance of Petitioner's indictments were dismissed in accordance with a plea agreement between Petitioner and the State. Pursuant to the recommendation by the State, Judge Addy sentenced Petitioner to imprisonment for five years. Petitioner received credit for five-hundred and fifty-six days. Petitioner did not file a direct appeal.

Petitioner filed his application for post-conviction relief on September 9, 2016 alleging ineffective assistance of counsel and citing various cases in support of his general allegation. Respondent sent a Return on February 17, 2017. On March 13, 2017, Petitioner, through counsel, amended his application with the following allegations:

1. Ineffective Assistance of Counsel as to Bryan C. Able, Esquire:

    a. Failed to file a motion for speedy trial, and if he did he also failed to have that motion addressed by the Court.

    b. Failed to secure preliminary hearing. When Mr. Able was asked when the preliminary hearing would be held he indicated the Applicant was already indicted the Applicant was already indicted, when in fact, the Applicant was not. Applicant was not indicted until over a year later.

    c. Failed to have bond reduction motion brought before Court.

    d. Failed to discuss possible defense and challenges to the evidence with the Applicant.

    e. Failed to challenge the Solicitor's incorrect statements made at the bond hearing regarding the fact. Had he done so, the Applicant would most likely have gotten a lower bond, PR bond, or ultimately the charges would have been dismissed.

2. Ineffective Assistance of Counsel as to Arron V. Taylor, Esquire:

    a. Failed to address that Applicant's probation was revoked before he pled guilty.

    b. Failed to address possible double jeopardy issues. There were multiple indictments for the same charges. Failed to also secure an arraignment on the charges that were directly indicted.

c. Failed to have Mr. Able's motions brought before the Court.

d. Failed to discuss challenges to the evidence with Applicant. Counsel only went over the paperwork with the Applicant and never discussed a trial strategy.

e. Failed to discuss with Applicant that he could challenge the inconsistent statements made by the witnesses and didn't make a motion *in limine* to have those statements addressed by the Court prior to a guilty plea.

On October 11, 2017, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Petitioner was represented by Ashley A. McMahan, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter. At the evidentiary hearing, Petitioner testified on his own behalf. Bryan Able and Aaron Taylor, Esquires, testified for the State. By order filed November 27, 2017, Judge Sprouse denied Petitioner's application in its entirety. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari.

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 give great deference 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. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. 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.

ARGUMENT

The post-conviction relief court properly determined trial counsel was not constitutionally ineffective in advising Petitioner on the potential sentence he faced prior to entering his guilty plea.

Petitioner asserts Counsel was ineffective in his representation because Counsel improperly advised Petitioner on the sentence he would serve after entering his guilty plea. During the post-conviction relief hearing, Petitioner testified Counsel "gave him the impression" he would only serve six months after pleading guilty. (Appx. 69.) However, the record clearly indicates Petitioner was informed by Judge Addy, Counsel, and the State that the State was recommending a five year sentence prior to Petitioner entering his guilty plea. Petitioner was also informed that his charge, first degree assault and battery, carries a sentence of up to ten years. During the plea hearing, Counsel successfully argued on Petitioner's behalf for Petitioner to receive credit for five-hundred and fifty-six days, which not only included days Petitioner served in jail, but also days Petitioner spent on probation. Additionally, Petitioner testified he had not been promised anything in return for his guilty plea. (Appx. 9.) The lower court properly found Counsel was not ineffective in his representation of Petitioner, as Petitioner was properly informed of the sentence he was facing and was not prejudiced by the sentence imposed. Further, Counsel cannot be responsible for the "impression" Petitioner developed based on his own calculations and predictions about the sentence he believed he should have received. Therefore, this Court should deny certiorari.

Petitioner went on to testify, "[Counsel] gave me the impression that I was going down the road to do 6 months, because on a non-violent sentence you do 30 months." (Appx. 69.) Petitioner was asked if Counsel told him specifically he would do six months and Petitioner responded, "Yeah, isn't that what was said, [Counsel], it was six months." (Appx. 69.) Even

during his own testimony, Petitioner was unsure whether Counsel specifically told him he would serve six months in jail. "Wishful 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.").

Here, the record is very clear that Petitioner was informed of his charge and sentence during the guilty plea hearing. Petitioner testified, aside from the five year recommendation, he had not been promised anything in return for his guilty plea and raised no further issues with the plea judge. (Appx. 9.) In fact, Petitioner thanked Counsel for his representation and told the post-conviction relief court that, but for Counsel, Petitioner would be "rotting in jail." (Appx. 56.) Near the end of the plea hearing, Petitioner was given the opportunity to address the court and Petitioner stated, "Just want [Counsel] to go ahead and get it over with." (Appx. 12.) Even though Petitioner was provided the opportunity, he failed to raise any issues or concerns regarding his sentence with the court or Counsel at that time.

Additionally, Petitioner has also failed to show how he was prejudiced by Counsel's representation. The Court in Strickland stated, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. 688 at 670. Here, Petitioner's case can easily be

disposed of for lack of prejudice. Petitioner was originally charged with two counts of attempted murder, two counts of criminal domestic violence, and possession of a weapon during the commission of a violent crime. Pursuant to the plea negotiation, Petitioner only pled guilty to a reduced charge of first degree assault and battery and received a generous five year sentence with a generous credit five-hundred and fifty-six days for time served. Counsel testified during the guilty plea hearing that, "[Petitioner] was looking at 0 to 30, [at] eighty-five percent. So obviously a strike and the State made a very generous offer which we appreciate. ...At one point we were ready to go to trial but [Petitioner] and I together as a team decided to do this, it was in his best interest." (Appx. 10-11.) Counsel further explained to the court that the recommended sentence was five years and not just time served because of Petitioner's criminal history. (Appx. 11.) It is clear from the record that the plea judge and Counsel discussed the charge and sentence with Petitioner prior to the guilty plea. It is also clear from the record that Petitioner not only received a "generous offer" from the State, but he also received the benefit of a generous credit of time served from the lower court. Petitioner has failed to show how he was prejudiced by Counsel's representation and, consequently, fails to meet the burden set forth in Strickland. Therefore, certiorari should be denied.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JANELL H. GREGORY
Assistant Attorney General
SC Bar No. 103176

By: _____
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Oct. 26, 2018

STATE OF SOUTH CAROLINA

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The Honorable R. Scott Sprouse, Circuit Court Judge

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KIRK WILLIS,

Petitioner,

v.

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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 mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense- Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 26th day of October, 2018

Carlotta L. Weaver

CARLOTTA L. WEAVER
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

October 26, 2018

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

Re: **Kirk Willis, #182845 v. State of South Carolina**
Appellate Case No. 2017-002508
Lower Court Case No. 2016-CP-30-757

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,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/clw

Enclosures

cc: Susan B. Hackett, Esquire (2 copies)