STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2017-002065

HENRY DELOS ANDERSON,

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 ISSUES

I. Did the post-conviction relief court properly determine Petitioner waived his right to belated appellate review under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), because, in Petitioner's proposed order of dismissal for his post-conviction relief case, Petitioner stated he waived his request for belated appellate review?

II. Did the post-conviction relief court properly determine Counsel was not constitutionally ineffective for failing to convey a written plea offer to Petitioner because Counsel testified it was his normal practice to convey offers to clients and Petitioner failed to show he would have accepted the plea offer since it did not allow Petitioner to plea to assault and battery, which is what Petitioner was requesting be offered to him by the State before trial?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. During the April 2013 term, the Newberry County Grand Jury indicted Petitioner for first degree criminal sexual conduct (2013-GS-36-0238), kidnapping (2013-GS-36-0239), and pointing and presenting a firearm (2013-GS-36-0240). Applicant was represented by Thomas E. Mosely, Esquire ("Counsel"). On February 10-14, 2014, Applicant proceeded to a jury trial before the Honorable Frank R. Addy, Jr. Petitioner was convicted by the jury on all charges as indicted. Judge Addy sentenced Petitioner to imprisonment for twenty years for first degree criminal sexual conduct, thirty years for kidnapping, and five years for pointing and presenting a firearm. All sentences were to run concurrently.

A notice of appeal was timely filed, however, the South Carolina Court of Appeals, by written Order dated July 9, 2014, dismissed Petitioner's appeal for counsel's failure to comply with Rule 267(a) and Rule 203 SCACR. The Remittitur was sent on July 15, 2014.

On June 10, 2015, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. On May 3, 2017, Applicant filed a Motion to Amend, alleging the following grounds:

1. Petitioner requests to be granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because Petitioner did not make a knowing and intelligent decision not to pursue an appeal, because Petitioner requested that trial counsel file and appeal, and trial counsel failed to timely cure the deficiencies as listed in the letter from the Court of Appeals to trial counsel on February 28, 2014, causing the Appeal to be dismissed. Petitioner has therefore suffered prejudice in the form of an unjust procedural error due to trial counsel's deficient performance.

2. Petitioner requests a new trial on the grounds of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Specifically, Petitioner alleges that trial counsel was deficient in his performance such that Petitioner was prejudiced for the following reasons:
    a. That trial counsel failed to prepare an Order for Bond after Petitioner was granted a bond by The Honorable Frank Addy on March 22, 2013 which

included home detention, but counsel for Petitioner failed and/or refused to prepare an Order granting the Defendant bond. Therefore, Defendant remained incarcerated.

b. That trial counsel failed to convey the State's plea offer[1] to Petitioner, which was conveyed to trial counsel by the State on October 24, 2013 via electronic mail.
c. That trial counsel failed to request that the Jury be charged with the lesser included offenses of Criminal Sexual Conduct – Second Degree and Criminal Sexual Conduct - Third Degree.

Respondent made its Return on February 12, 2015. On June 5, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper at the Laurens County Courthouse. Petitioner was present and represented by Laura Saunders, Esquire ("PCR Counsel"). Respondent was represented by Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner testified on his own behalf. Counsel also testified. At the close of the hearing, Judge Cooper requested proposed orders from both parties. In Petitioner's proposed order of dismissal, he explicitly withdrew his request for belated appellate review. By order filed September 28, 2018, Judge Cooper denied Petitioner's application in its entirety finding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant his post-conviction relief application. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

[1] In the State's offer, Petitioner would plead straight up to a reduced charge of criminal sexual conduct second ("CSC 2nd"), the State would dismiss the kidnapping charge, and would recommend the pointing and presenting charge run concurrent with the CSC 2nd offense. Additionally, the State would not directly indict Petitioner for possession of a weapon during the commission of a violent crime.

STATEMENT OF THE FACTS

Petitioner and Tywanda, the victim ("Victim"), dated for approximately 10 months, but the relationship ended on December 29, 2012. (App. 157, 160.) Around January 21, 2013, Petitioner began texting the victim and sent a video to her of him with a gun saying he was going to end his life. (App. 167-168.) After responses back and forth, the victim told him "after today's events, I wouldn't feel comfortable around you anymore". (App. 174.) The victim also told him to mail her things and she would mail his things. (App. 176.) Petitioner responded and said "you can come and get it". (App. 177.) The victim continued to say she would mail his stuff and she would report her things stolen. (App. 177.) Petitioner then began calling her. (App. 178.) When she didn't answer, he texted her saying, "you might as well call the police, [Victim]. You ain't getting nothing until I get my money from you and your brother and my coat and stuff." (App. 179.) Petitioner continued to text the victim and kept apologizing and asked her to be in his life. (App. 180.) The victim then blocked the Petitioner's phone number using an app called Mr. Number, which would allow her to receive messages, but not respond. (App. 180, 183.) After that, she went to the police to get a restraining order against Petitioner. (App. 180.)

From January 25-27, 2013, Victim received multiple blocked messages from Petitioner stating, "Keep ignoring my call", "Bring my coat to me tomorrow", and "I took a warrant out for you for my stuff, So you have until Wednesday to bring my stuff or you going to jail". (App. 185.) On January 29, 2013, Victim ended up responding to him saying, "I found your coat. You can meet me in Walmart parking lot and get it, or do you perfect I mail it?" (App. 187.) Petitioner then texted her multiple times saying "You can bring it my house", "I'm not playing with you. You will go to jail, Ty. Bring me my stuff to me." (App. 187.) He then told her "I'll be down here in the morning about 6:45 or 7:00 to get my coat." (App. 187.)

On January 30, 2013, Petitioner arrived at the victim's home and texted her saying, "I'm outside. Bring me my coat". (App. 166, 191.) The victim then went outside with his coat and Petitioner exited his vehicle. (App. 166, 191.) He asked her why they could not be friends and Victim said she did not feel comfortable around him anymore. (App. 192.) At that point, Petitioner asked for a hug and he when he pulled her in, he placed a gun to her head and told her to get in the vehicle. (App. 192.) Victim got in the car then Petitioner drove to the cell phone tower on Stoney Battery road with the gun in his lap. (App. 192.) Once there, he kept asking her to talk. (App. 192.) Victim started to cry and Petitioner got out of the car and opened the door for her. (App. 192.) Petitioner asked Victim why she was afraid and then said, "Since you think I'm going to hurt you, I have to hurt you". (App. 192, 199.) Victim testified, "[Petitioner] led me to the front of the car, lowered my clothes and preceded to have sexual intercourse." (App. 192, 199.) At trial, Victim testified while he was raping her, he asked her if she was going to have his child." (App. 205.)

At trial, when Victim was asked if she got into the car voluntarily and whether she felt free to leave, she testified "No, sir. I did not." (App. 194.) Victim testified the intercourse with Petitioner was not consensual and she was raped. (App. 200.) After the incident, Petitioner told Victim not to tell anyone and, if she did, he would come back and kill everyone inside her house. (App. 200.) Once he left, Victim told her sister and she called law enforcement. (App. 200.) While she was speaking to the police, Petitioner continued to text Victim and tell her, "Best thing for you to do is text me and be there as a friend with benefits." (App. 202.) He also texted her, "You can't text me, then I'll have to just make you fear me." (App. 203.) While Victim was with law enforcement, they asked her to unblock him and text him back asking where he was. (App.

204.) Petitioner texted her again multiple times and his last text stated, "You're setting me up. I know you, that's why you not texting me back." (App. 207.)

Victim's mother testified that on January 21, 2013, Petitioner came to her house while Victim was at work. (App. 325.) When she saw him, he had a gun in the waistband of his pants. (App. 326.) She then asked him what he was doing with the gun and he replied "for a purpose." (App. 326.) Officer James Henderson also testified at trial that, prior to the incident, Victim no longer wished to speak to Petitioner because she had concerns about her safety. (App. 335-336.) Officer Brad Epps testified at trial that he was dispatched to the scene and spoke to Victim. (App. 361-362.) The victim gave him Petitioner's name, description and vehicle tag. (App. 361-362.) He collected her clothing and took her to the hospital where a rape kit was conducted. (App. 366.)

Later, Officer Matthew Veal was contacted and told to look for the Petitioner. (App. 391.) Officer Veal went to Petitioner's residence and a female at the home told him Petitioner just left. (App. 392.) Officers asked her to make contact with him and she complied. (App. 396.) Officers were then advised Petitioner would be coming back. (App. 393.) Officer Veal went back toward the highway to make sure he was coming back and, as soon as he made a right on the highway, he noticed Petitioner walking toward his residence. (App. 393.) Petitioner was then arrested. (App. 394.) Following Petitioner's arrest, lead investigator, Garrett Lominack ("Lominack"), interviewed Petitioner where he confessed. (App. 408-409.) In the confession, Petitioner told Lominack the gun was under a bed in his room. (App. 408-409.) During a consensual search of Petitioner's room, the gun was recovered from that location. (App. 395, 401.) At first, Petitioner admitted to being at the victim's house earlier that morning, but claimed they did not have sex. (App. 409.) Later, Petitioner said he did engage in sexual activity with Victim, but that it was consensual. (App. 415-416.)

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. Id. at 179 (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. Smalls, 422 S.C. 174, 810 S.E.2d 836. 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. 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. "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." 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. 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

I. The post-conviction relief court properly determined Petitioner waived his right to belated appellate review under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), because, in Petitioner's proposed order of dismissal for his post-conviction relief case, Petitioner stated he was waiving his request for belated appellate review.

Petitioner alleges the post-conviction relief court erred in finding Petitioner waived his right to belated appellate review under White v. State in this case. However, after each side presented their case at the post-conviction relief hearing, Judge Cooper requested proposed orders of dismissal from each party. In Petitioner's proposed order of dismissal[2], Petitioner explicitly withdrew his request for belated appellate review. Although Judge Cooper's findings did not align with the remaining portions of Petitioner's proposed order of dismissal, he clearly accepted Petitioner's waiver of his right to belated appellate review in the proposed order and made his findings accordingly. Petitioner has not shown how this waiver was in error, especially since Petitioner never offers an argument substantiating his request for belated appellate review later in the proposed order of dismissal; which indicates his waiver was intentional and not an oversight or error. The post-conviction relief court properly determined Petitioner waived his request for belated appellate review and this Court should deny certiorari.

"To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) (citing Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)).

[2] Respondent has submitted a Motion to Amend the Appendix in conjunction with this Return to Petition for Writ of Certiorari requesting the Appendix be amended to include Petitioner's proposed order of dismissal. Respondent believes Petitioner will amended the Appendix since Petitioner has consented to Respondent's motion, however, at the time of this brief, Respondent does not have the page numbers to cite to for the amended Appendix.

On July 5, 2017, Petitioner submitted his proposed order of dismissal to the post-conviction relief court, which stated, "Petitioner waives his request for a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)." Petitioner was fully aware of his right to belated appellate review since it was one of the allegations he set forth in his application for post-conviction relief. Petitioner was also present for the full evidentiary hearing, which included testimony from Counsel regarding his appeal and argument from PCR Counsel advocating for Petitioner to receive belated appellate review. Following the hearing, Petitioner chose to waive his right to belated appellate review in the proposed order he submitted to the court.

Petitioner's waiver was submitted to the post-conviction relief court through PCR Counsel who had been appointed to represent Petitioner since the beginning of his post-conviction relief process. It is evident from the record PCR Counsel was prepared to go forward with his request for belated appellate review and properly elicited testimony from Counsel to support Petitioner's argument. Had Petitioner wanted to continue with this claim, it is clear PCR Counsel would have pursued this ground in her proposed order based on the way she conducted her questioning of witnesses during the post-conviction relief hearing. PCR Counsel obtained compelling testimony from Counsel to substantiate Petitioner's request for belated appellate review, and there is nothing before this Court indicating PCR Counsel would have discontinued advocating for Petitioner's belated appellate review had Petitioner not elected to waive his request. Based on Petitioner's explicit waiver of his request for belated appellate review in the proposed order of dismissal, the post-conviction relief court properly dismissed this allegation and this Court should deny certiorari.

II. **The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to convey a written plea offer to Petitioner because Counsel testified it was his normal practice to convey offers to clients and Petitioner failed to show he would have accepted the plea offer since it did not allow Petitioner to plea to assault and battery, which is what Petitioner was requesting be offered to him by the State before trial.**

Petitioner alleges the post-conviction relief court erred in finding Counsel was not constitutionally ineffective for failing to convey a written plea offer to him prior to trial. Petitioner claims he would have accepted the plea offer had Counsel communicated the offer. However, the post-conviction relief court properly found credible Counsel's testimony that he communicated the offer to Petitioner. Further, based on the letters Petitioner wrote to the Eight Circuit Solicitor's Office, Petitioner was only willing to accept a plea if his charges were reduced to first degree assault and battery or simple assault with a suspended, probationary, or a time served sentence. The State never made such an offer. The plea offer Petitioner now claims he would have accepted would have required Petitioner to plead guilty to second degree criminal sexual assault, which carries a potential twenty year sentence. Petitioner now claims he would have been willing to accept that offer, even though that claim is in direct conflict with his actions and statements prior to trial. The post-conviction relief court properly found Counsel communicated the plea offer to Petitioner. The post-conviction court also found, even if Petitioner was not told of the offer, he still failed to meet his burden to show how he was prejudiced because, based on Petitioner's letters, it is highly unlikely Petitioner would have accepted the State's offer. Petitioner's letters show he was seeking a plea offer with drastically reduced charges that would allow Petitioner to receive a suspended, probation, or time served sentence. A plea of that nature was *never* offered by the State, and only in hindsight does Petitioner find the State's original offer favorable. The post-conviction relief court properly denied Petitioner relief on this allegation and this Court should deny certiorari.

Petitioner asserts he was prejudiced by Counsel's failure to communicate the plea offer because Petitioner states he would have accepted the offer if he was given the opportunity. This Court held in Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), "Because presumed prejudice is reserved to very limited situations, we hold that a defendant must show actual prejudice." In order to prove prejudice, this Court held in Collins v. State, 422 S.C. 250, 810 S.E.2d 871 (2018), Petitioner would have to show:

> 1) He "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;" 2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and 3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

Id. at 262 (citations omitted).

Petitioner likens his case to the petitioner in Missouri v. Frye, 566 U.S. 134 (2012). However, Petitioner's case is distinguishable from the petitioner in Frye because Frye's counsel never told him about the two plea offers in his case. Here, as the post-conviction court properly found, Counsel told Petitioner about the State's offer. The post-conviction relief court properly found credible Counsel's testimony that it was his normal practice to convey plea offers to his clients and "somewhere along the line" he presented the plea offer to Petitioner. (App. 738.) During cross-examination, Counsel testified Petitioner did not want to accept a plea that involved a sexual offense and, further, did not want to accept a straight-up plea, even if it involved a lesser offense, because the sentence would have been left up to the court. (App. 744.) Petitioner testified, "[Counsel] asked me straight up, he said, before we go through these double doors, he said do you want me to walk over there to the Solicitor and see if they want to work a deal." (App. 719.) Based on Petitioner's own testimony it is evident Counsel attempted to work out a deal on Petitioner's behalf up until the trial, so it stands to reason that, had Petitioner wanted to accept the

plea deal offered to him prior to trial, Counsel would have assisted his client in moving forward with that offer.

Nevertheless, Petitioner testified he would have taken the plea offered by the State had he known about it because, "that would have knocked ten years off of my sentence. Yeah, I would have took that in a heartbeat." (App. 701.) However, this testimony is not credible as Petitioner could not have known, prior to being sentenced after his trial, the State's plea offer would have "knocked ten years off" of his sentence. As Counsel testified, Petitioner was not interested in an offer that would have required him to plead to a sex offense or would have potentially required additional incarceration.

Counsel's testimony is corroborated by the letters Petitioner sent to the solicitor's office. One of the letters states in part, "I will plea to Assault and Battery 1st degree. I'm willing to take a suspended sentence [,] probation or time serve." (App. 769.) He went on to write, "If I can't get my charges dropped to plea then I will take it to trial." (App. 769.) It is evident Petitioner was only willing to entertain a plea offer if it significantly reduced in his charges, did not require him to plead to a sex offense, and did not require any additional jail time. Petitioner's claim that he would have been willing to accept the State's offer is directly contradicted by his letters and Counsel's credible testimony. Consequently, Petitioner fails to satisfy the burden set forth in Collins, as Petitioner's statements and actions prior to trial show he would not have accepted the State's offer since it did not meet the requirements Petitioner set forth in his letter.

Ultimately, the post-conviction court properly found credible Counsel's testimony that he conveyed the plea offer to Petitioner and, even if Counsel had failed to convey the offer, Petitioner failed to meet his burden to show he would have taken the plea offer. (App. 854.) Petitioner's letters alone show he was only willing to accept a plea that reduced his charges significantly and

prevented him from serving any additional jail time. Counsel's credible testimony further indicates Petitioner would not have accepted a plea that left sentencing open to the court's discretion. In hindsight, Petitioner finds the State's offer to be favorable and provided testimony during the post-conviction relief hearing that directly contradicts the letters he wrote to the solicitor's office in an attempt to secure a plea prior to trial. The post-conviction relief court properly denied Petitioner relief on this claim and this Court should deny Certiorari.

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,

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December 14, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
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HENRY DELOS ANDERSON,

Petitioner,

v.

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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:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense- Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 14th day of December, 2018

Carlotta L. Weaver
CARLOTTA L. WEAVER
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

December 14, 2018

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

Re: **Henry Delos Anderson v. State of South Carolina**
Appellate Case No. 2017-002065
Lower Court Case No. 2014-CP-36-0401

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: Kathrine H. Hudgins, Esquire (2 copies)