

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable R. Markley Dennis, Plea Judge
The Honorable Bentley Price, Post-Conviction Relief Judge

Appellate Case No. 2019 – 001129

ROLANDO ALDAMA-OCAMPO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Trial counsel erred in failing to ascertain and convey the expiration date attached to the terms and conditions of the plea offer presented by the state because counsel had a duty to communicate the time limits to petitioner.

Respondent's Counterstatement of Issue on Certiorari

The PCR court properly denied relief as to Petitioner's assertion that Counsel was constitutionally ineffective for failing to communicate the expiration of a plea offer where probative evidence established Counsel sent a letter with English and Spanish translations that explicitly communicated the deadline for acceptance of the plea offer as January 4, 2018, but Petitioner did not respond to Counsel before that deadline.

STATEMENT OF THE CASE

In August 2017, Rolando Aldama-Ocampo (Petitioner) was indicted for murder. App. 85-86. Petitioner was represented by Mark Andrew Peper (Counsel). App. 1. Assistant Solicitor Culver Kidd, IV, prosecuted the case. App. 1.

On August 13, 2018, Petitioner entered an *Alford*¹ plea to the lesser included offense of voluntary manslaughter before the Honorable R. Markley Dennis, circuit court judge. App. 17. Petitioner pleaded with a negotiated thirty year sentence.² Judge Dennis accepted Petitioner's *Alford* plea sentenced him accordingly—thirty years' for voluntary manslaughter. App. 17. Petitioner did not appeal. App. 20.

On October 23, 2018, Petitioner filed an application for post-conviction relief (PCR) alleging:

1. Ineffective Assistance of Counsel
2. Subject matter jurisdiction
3. Violation of constitutional rights

The State filed its return on January 31, 2019. App. 27. An evidentiary hearing was held on May 20, 2019, before the Honorable Bentley Price, circuit court judge. App. 34. Petitioner was present at the hearing and represented by Christopher L. Murphy, Esquire. App. 34. Assistant Attorney General Jacob A. Isenberg represented the State. App. 34. Petitioner and Counsel testified at the PCR hearing.

On June 14, 2019, Judge Price denied relief, finding Petitioner failed his burden to prove Counsel was ineffective based upon the failure to communicate a plea offer, and dismissed the

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

² The State also dismissed various less-serious charges in exchange for Petitioner's *Alford* Plea. App. 17.

action with prejudice. App. 82. Specifically, Judge Price found that Counsel successfully communicated the plea offer to Petitioner by sending Petitioner an English letter accompanied by a Spanish translation that set an explicit deadline of acceptance by January 4, 2018. App. 79. Furthermore, Judge Price found that Petitioner failed to present any evidence or testimony to indicate he attempted to accept the offer before the deadline and therefore failed to overcome his burden to prove: (1) he would have accepted the initial offer with effective counsel; and (2) the Solicitor would have formally offered the fifteen year plea. App. 80.

Petitioner filed a timely notice of appeal on July 10, 2019.

STATEMENT OF THE FACTS

Petitioner's charges stem from the death and disappearance of Rolando Martinez Castro (Victim). App. 11. In April 2016, Victim's body was found buried behind Petitioner's apartment in a shallow grave, covered in salt. App. 13. Victim died from a stab wound to the chest. App. 13. Victim was also stabbed in the eye and beaten before his death. App. 13.

Petitioner and Victim began dating sometime in mid-2015. App. 11. They lived together in Petitioner's apartment above La Bomba Bar and Grill. App. 11. At some point in late-2015, the couple broke up. App. 11. After the break-up, Victim left the residence with Petitioner's minor niece in Petitioner's car. App. 11. Apparently, Victim also had a sexual relationship with Petitioner's niece. App. 11. The State alleged these events showed motive. App. 11.

Victim returned to Petitioner's apartment in the early morning on November 18, 2015. App. 12. Victim was never seen again. App. 12. Petitioner became a suspect after two witnesses told law enforcement Petitioner was involved. Law enforcement interviewed Petitioner and Petitioner admitted to his involvement, and implicated others, in Victim's disappearance. App. 12. At the guilty plea hearing, Petitioner agreed with these facts and told the plea court he did not disagree with any of them. App. 14.

PCR Hearing Testimony

Petitioner testified he did not understand the numerous letters Counsel sent over the course of his case. App. 41. Petitioner testified he did not speak English. App. 39. Petitioner also testified he could understand some, but not much of what the plea court and the State were saying at the plea hearing. App. 47. However, Petitioner testified that he was offered an interpreter for the hearing. App. 47. Petitioner testified Counsel only met with him a couple of times. App. 40. Petitioner testified he would have accepted the initial plea offer of fifteen years. App. 44.

Petitioner testified he learned a little bit of English in jail while trying to understand Counsel's letters. App. 39. Petitioner testified he was in the country illegally, and is aware he will be deported if released. App. 39.

Counsel testified he represented Petitioner for over two years. App. 54. Counsel testified he hired a paralegal who spoke Spanish for the sole purpose of Petitioner's case. App. 56. Counsel further testified Petitioner spoke good English, there was never an issue with communication, and he never felt the need to have a translator present at meetings with Petitioner. App. 55. Counsel also testified that almost every letter he sent to Petitioner included an English letter and a Spanish translation. App. 56-57.

Additionally, Counsel testified that in December 2017, the original solicitor prosecuting the case had received permission to verbally extend an offer of fifteen to twenty years. App. 59. However, Counsel testified that offer was premised on the assistant solicitor trying to wrap up cases before leaving the office. App. 33. Counsel testified he requested approval from Petitioner to accept this offer by letter that included an English and Spanish translation. App. 59-60. Counsel further testified that the letter laid out that a decision needed to be made by the first of the year, prior to the status conference scheduled for the week of January 4, 2018. App. 60. Counsel testified that by the date of the status conference, Petitioner had not given him any authority to accept the fifteen-to-twenty year offers; therefore, he could not accept the offer on Petitioner's behalf at that time. App. 60. Close to the date of the plea hearing, Counsel recalled the Solicitor conveyed to him that she would not have approved the former solicitor's fifteen year offer. App. 61.

Counsel testified there was a substantial amount of evidence against Petitioner collected from the scene, as well as video footage and cell-phone records. App. 57. Counsel testified he

later learned a new assistant solicitor was assigned the case, and, after reviewing the evidence, the new assistant solicitor offered thirty years for voluntary manslaughter. App. 62. Thereafter, Counsel testified the State made it clear that this was the only offer on the table. App. 62.

Counsel testified he had a thorough conversation with Petitioner about accepting the State's offer. App. 58-59. Counsel testified Petitioner appeared to have researched and studied the issues in his case based on Petitioner's depth of knowledge on each issue. App. 58. Finally, Counsel testified he believed Petitioner understood all of their conversations. App. 55.

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-81, 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)). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. 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).

ARGUMENT

The PCR court properly denied relief as to Petitioner’s assertion that Counsel was constitutionally ineffective for failing to communicate the expiration of a plea offer where probative evidence established Counsel sent a letter with English and Spanish translations that explicitly communicated the deadline for acceptance of the plea offer as January 4, 2018, but Petitioner did not respond to Counsel before that deadline.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was deficient in his handling of a fifteen-year plea offer and that this deficiency resulted in him entering a negotiated guilty plea for significantly more time. Specifically, Petitioner argues the PCR court erred because Counsel had a duty to communicate the expiration to Petitioner and Counsel did not adequately convey the expiration date. However, the PCR court properly rejected this argument, finding Petitioner failed to establish that Counsel failed to convey an expiration date of the fifteen year plea offer and failed to establish that the plea offer would have been accepted by the prosecution or would have been accepted by a plea court prior to expiration. These findings resolved a factual dispute—did Counsel reasonably convey the plea offer’s expiration date? *See Foye*, 335 S.C. at 589, 518 S.E.2d at 267 (reasoning appellate court’s give great deference to a PCR court’s credibility findings because appellate court’s lack the opportunity to directly observe the witnesses). Therefore, these findings are not controlled by an error of law and are supported by probative evidence in the record. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s

conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” *Strickland*, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668. First, Petitioner must prove that counsel’s performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

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.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” *Id.* at 690.

“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” *Garren v. State*, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see *Jamison v. State*, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

“Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Missouri v. Frye*, 566 U.S. 134, 145 (2012). When alleging plea counsel was ineffective in his or her handling of a plea offer, an applicant “must demonstrate a reasonable probability that: (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.” *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing *Frye*, 566 U.S. at 147); see *Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (stating “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed”). An applicant must establish not just that a favorable plea offer was not communicated, but also that “the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.” *Id.*

In the present case, the record establishes Counsel sufficiently communicated the potential fifteen-year plea offer and its expiration date via a letter accompanied by a Spanish translation. App. 79. Also, the record establishes that Petitioner failed to respond to that letter by the expiration date. App. 79. Based on the evidence and testimony presented at the evidentiary hearing, the PCR court properly determined Petitioner failed to meet his requisite burden of proof because he could not establish that Counsel failed to communicate the expiration date of the offer and failed to establish that the offer would have been accepted by the prosecution. There is abundant probative evidence to support these findings.

At the PCR hearing, Counsel credibly testified that when he received the offer of fifteen-to-twenty years, he sent Petitioner a letter in English with a Spanish translation explaining the terms of the offer. App. 5960. Petitioner testified towards the belief he was entering into this

agreement at the eventual hearing based upon that letter. App. 44. However, the PCR court found this testimony not credible because Petitioner did not present evidence or testimony to indicate he attempted to accept the offer before the deadline laid out in that letter.

A follow-up letter from Counsel to Petitioner after the guilty plea, written in English and including a Spanish translation, was jointly moved into evidence at the hearing. App. 66. That letter referenced the events and circumstances regarding the offer and what transpired after the January 4, 2018 status conference. App. 69. The PCR court relied heavily on the letters in making its finding. App. 67. Specifically, the PCR court found the letter explicitly communicated that “a decision needed to be made by the first of the year [January 1, 2018],” and that Counsel needed a decision prior to the status conference scheduled for January 4, 2018. App. 60. Counsel credibly testified that by the date of the status conference, Petitioner had not given him any authority to accept the fifteen-to-twenty year offers; therefore, he could not accept the offer on Petitioner’s behalf at that time. App. 60.

At the PCR hearing, it was Petitioner’s burden to present evidence or testimony to indicate that he attempted to accept the offer. The only testimony he gave in support is that he would have accepted the fifteen years’ had he known he would end up with a worse plea agreement. Therefore, the PCR court properly found that Counsel was not ineffective because Counsel did in fact communicate the plea offer and Petitioner did in fact fail to show that he made any attempt to accept the offer by the January 4, 2018 status conference. There is abundant evidence of probative value to support the PCR court’s findings.

Moreover, these findings are not controlled by an error of law. For relief to be granted, an applicant has to show not only that there was a more favorable plea offer that was not conveyed and he or she would have accepted it, but also must establish that the prosecution would not have

cancelled the offer and the court would have accepted it. *Collins*, 422 S.C. at 262, 810 S.E.2d at 877 (when alleging plea counsel was deficient in his or her handling of a plea offer, an applicant “must demonstrate a reasonable probability that: (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.’”).

Here, Petitioner made no showing that there was a reasonable probability that the solicitor would have adhered to the fifteen year offer. App. 80. To the contrary, Counsel credibly recalled the Solicitor stating the fifteen year offer would not have been approved. App. 79. Also, Counsel credibly testified the Solicitor who took the case over, after reviewing the evidence, stated thirty years for voluntary manslaughter would be the only offer. Counsel credibly assessed the only formal offer was thirty years. App. 80.

Ultimately, the post-conviction relief court found Petitioner was unable to establish the fifteen-year plea offer would have been accepted prior to cancellation by the prosecution or acceptance by the plea court. App. 80. These findings are supported by probative evidence and not controlled by an error of law. Accordingly, these findings should be upheld and this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, the State requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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