

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Horry County

Honorable John C. Hayes, Circuit Court Judge
—————

RECEIVED

Aug 24 2020

S.C. SUPREME COURT

MALIKAIH TAYLOR,

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO 2019-001466
—————

RETURN TO PETITION FOR WRIT OF CERTIORARI
—————

ALAN WILSON
Attorney General

WILLIAM H. RAY
Assistant Attorney General
S.C. Bar No. 104476

P.O. Box 11549
Columbia, SC 29211
(803) 734-4276

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED ON CERTIORARI 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW 3

ARGUMENT

The post-conviction relief court properly determined that Petitioner failed to establish ineffective assistance of counsel because his failure to accept a plea offer was not due to his counsel’s purportedly erroneous advice. Rather, Petitioner let the initial plea offer expire before accepting a subsequent offer because he wanted to delay resolution of his case while also avoid forcing his daughter to testify against him at trial

3

CONCLUSION..... 8

ISSUE PRESENTED ON CERTIORARI

Petitioner's Issue Presented

Did the PCR court err in finding petitioner was not prejudiced by plea counsel's deficient advice regarding parole eligibility where petitioner testified he would have accepted the twenty year plea offer regardless of parole eligibility?

Respondent's Counter-Statement of Issue Presented

Did the PCR court properly find Petitioner failed to establish counsel was constitutionally ineffective in his advice and handling of a plea offer from the State, where Petitioner's decision not to accept the offer was motivated by his desire to delay resolution of his case and prevent the victim—his minor daughter whom he sexually assaulted—from testifying at trial, when Petitioner failed to establish his rejection of the offer was based on any purportedly erroneous advice regarding parole eligibility?

STATEMENT OF THE CASE

On April 20, 2017, a Horry County grand jury indicted Petitioner Malikaih Taylor for first-degree criminal sexual conduct with a minor. (2017-GS-26-02245) stemming from his repeated sexual assault of his biological daughter over a two-year period. Thomas Floyd, Esq., represented Petitioner and Assistant Solicitor C. Leigh Andrew of the Fifteenth Circuit Solicitor's Office prosecuted the case. (App. 1.) On November 6, 2017, Petitioner appeared before the Honorable Steven H. John and pled guilty without any negotiation or recommendation from the State. (App. 1).

Petitioner testified at the plea hearing that he had spoken with his plea counsel about the sentence and the time it required him to spend incarcerated. (App. 4-5). Petitioner also testified that he had enough time to talk with his plea counsel, told him everything he wanted about his case, was satisfied, and had no complaints about the representation. (App. 7-8). Judge John sentenced Petitioner to twenty-seven years imprisonment. Petitioner did not appeal his plea or sentence.

Petitioner filed an application for post-conviction relief (hereinafter "PCR") on September 24, 2018, alleging various allegations of "Insufficient Counseling." (App. 16) In Petitioner's PCR application, he alleged that he was being held unlawfully due to ineffective assistance of counsel. (App. 22) Specifically, Petitioner alleged as follows:

I was offer a plea for 20 years and my lawyer Thomas Floyd never came to explain the plea offer to me. However, after the expiration of the plea he came and visit me concerning [trial]. When I question him about the plea offer, he stated that he was out sick.

Id. Respondent made its return to the application and requested an evidentiary hearing. (App. 23 – App. 28). An evidentiary hearing was held on June 18, 2019, before the Honorable John C. Hayes, III. (App. 30). James Falk, Esq., represented Petitioner and Jacob Isenberg,

Assistant Attorney General, represented the State. *Id.* The hearing saw testimony from both Petitioner and his plea counsel, Mr. Floyd, regarding his allegations of ineffective assistance of counsel.

Following the hearing, the PCR court denied and dismissed the application, finding Petitioner failed to establish any constitutional deficiencies entitling him to relief. (App. 77 – App. 92). The court found that Petitioner was not prejudiced by his plea counsel’s representation because whatever advise plea counsel may have given Petitioner did not affect Petitioner’s decision to let the offer expire.

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). Overall, reviewing courts give “great deference to the post-conviction relief court’s findings of fact and conclusions of law,” *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. 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). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E. 2d 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined that Petitioner failed to establish ineffective assistance of counsel because his failure to accept a plea

offer was not due to his counsel's purportedly erroneous advice. Rather, Petitioner let the initial plea offer expire before accepting a subsequent offer because he wanted to delay resolution of his case while also avoid forcing his daughter to testify against him at trial.

On appeal, Petitioner argues that the post-conviction relief court erred in finding that Petitioner was not prejudiced by plea counsel's advice regarding parole implications of the plea offer because Petitioner would have accepted the twenty-year offer regardless of parole eligibility. Petitioner argues that this establishes that counsel was constitutionally ineffective and ineffectiveness warrants remanding the matter back to the court of general sessions. However, the post-conviction relief court properly rejected this argument, finding that Petitioner failed to establish that he was prejudiced by any erroneous advice that may have been given by his plea counsel. This Court should deny certiorari.

In a PCR action, Petitioner bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner 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 v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); *Butler*, 286 S.C. at 442.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668, 104 S.Ct. 2052. 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, 104 S.Ct. at 2066). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal

cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “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, 104 S.Ct. at 2066). 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.

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1628-29 (1977). (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 873-74 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

Plea counsel has no duty to inform an applicant about collateral consequences, which are defined as those having a direct, immediate, and automatic effect on the range of punishment. *Page v. State*, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005) (finding future civil proceedings are not a

direct consequence of pleading guilty); *See Randall v. State*, 356 S.C. 639, 641, 591 S.E.2d 608, 609-10 (2004) (reaffirming parole eligibility is a collateral consequence where counsel has no duty to advise); *See Smith v. State*, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997) (finding the consequences of pleading to a violent crime are collateral so counsel had no duty to advise); *See Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475 (2002) (finding release under community supervision is a collateral consequence where counsel has no duty to inform). However, counsel has a duty not to misadvise an applicant on collateral consequences. *Coats v. State*, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003) (finding advice which made applicant believe he would be eligible for parole could affect the validity of the plea entered).

These 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, 104 S.Ct. at 2055. 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. *Id.* at 696-97, 2055-56.

Petitioner's assertion that his plea counsel's purported deficiency undermined the proper functioning of the adversarial process is without merit. Petitioner's argument is based upon his testimony that he received a twenty year plea offer from the State while he was in jail awaiting trial, was unable to contact his attorney with questions about parole eligibility before the offer expired, and was then faced with either accepting a less favorable plea offer or going to trial. (App. 36, 1-13; App. 37, 22-25). In fact, Petitioner claimed that he tried to call plea counsel every single day, from July 2016 until August 2017, to discuss the plea offer. (App. 42, 12-18; App. 43, 2-6). Petitioner testified that his ultimate acceptance of a subsequent plea offer was motivated by his

desire to “do the right thing” and avoid putting “his family through any more pain.” (App. 12, 3-5; App. 46, 21-23). He even testified that he would have accepted the initial plea offer irrespective of its parole implications. (App. 46, 21-23).

This supposed eagerness to accept the plea offer begs the question of why Petitioner wanted to get in touch with plea counsel so badly to discuss its terms. Petitioner claims that he had the offer in hand, knew of its expiration date, and was willing to accept it regardless of when he would be eligible for parole. All he had to do was mark the “x” next to “accept” and put the offer in the mail. Instead, Petitioner let the offer expire. Now, after being sentenced to a longer prison term, Petitioner claims that he did not accept the offer because his attorney could not be reached to discuss parole eligibility.

Petitioner’s plea counsel disagreed with that story of events. He testified that his office had mailed the plea offer to Petitioner, then he went to the jail, discussed it with Petitioner, and advised him of the parole implications as well as the risks of going to trial. (App. 51, 5 – App. 52, 12). According to Petitioner’s plea counsel, Petitioner did not want to plead guilty, nor did he want to go to trial. (App. 54, 1-3). Instead, Petitioner preferred to wait it out as long as he could and did not plead guilty until the morning that trial was scheduled to begin. The jury was literally waiting in the next room when Petitioner finally admitted his guilt. (App. 9, 9-13). Petitioner was then sentenced to twenty-seven years. (App. 13, 1-14).

The PCR court found Petitioner’s plea counsel credible and accepted his testimony that Petitioner wanted to avoid both pleading guilty and going to trial. Waiting until the last second to admit guilt is consistent with plea counsel’s statement that Petitioner wanted to avoid causing his family more pain by forcing them to testify. It is clear that his decision to not accept the initial plea offer was a result of his unwillingness to make a decision before the offer expired, not a result of

uncertainty about the plea offer's terms or an inability to get in touch with counsel. Whether plea counsel gave Petitioner deficient advice regarding the offer is irrelevant, because it did not impact Petitioner's decision to let the offer expire. Because of this, Petitioner cannot establish ineffective assistance of counsel. Therefore, the PCR Court's findings are not controlled by an error of law and are supported by the probative evidence in the record. Consequently, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR Court's findings that Petitioner received effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted

ALAN WILSON
Attorney General

WILLIAM H. RAY
Assistant Attorney General

/s/ William H. Ray
William H. Ray
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

This 24th day of August, 2020