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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Trial Judge
Honorable Jocelyn Newman, Post-Conviction Relief Judge

Appellate Case No. 2020-000712

Fred Jack Sanders, Petitioner,

vs.

The State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE PRESENTED

Petitioner's Statement of Issue

Whether trial counsel provided ineffective assistance of counsel when he failed to properly convey the State's guilty plea offer, to possession of heroin with intent to distribute, second offense, to Petitioner where trial counsel was on notice Petitioner wanted a guilty plea offer with the potential to have the entire sentence suspended upon completion of the drug court program?

Respondent's Counterstatement of Issue

Did the PCR court correctly find trial counsel was not constitutionally ineffective in relaying an offer to plead guilty without recommendation or negotiation to possession of with intent to distribute heroin – second offense to Petitioner where Counsel credibly testified he understood the terms of the offer and would have discussed it with Petitioner?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted by the September 2013 term of the Richland County Grand Jury for manufacturing methamphetamine (2013-GS-40-05845), possession with intent to distribute methamphetamine (2013-GS-40-05848), possession with intent to distribute crack cocaine (2103-GS-40-05848), possession of a firearm by a person convicted of a crime of violence (2013-GS-40-05849), possession of a controlled substance (diazepam) (2013-GS-40-05850), and possession with intent to distribute heroin – third or subsequent offense (2013-GS-40-05851).

Assistant solicitors Kathryn Cavanaugh and Foster M. Matthews prosecuted the case. Lucas Hawkes and John Christopher Shipman, Esquires, represented Petitioner. Following pretrial motions, Petitioner entered a guilty plea to the firearm charge and was sentenced to five years' imprisonment. Then, from March 17-19, 2014, Petitioner proceeded to trial before the Honorable G. Thomas Cooper, Jr., and a jury on the remaining charges. The jury convicted Petitioner as indicted of manufacturing methamphetamine, possession of a controlled substance (diazepam), and possession with intent to distribute heroin. The jury also convicted Petitioner of the lesser-included offenses of possession of methamphetamine and possession of crack cocaine. Judge Cooper sentenced Petitioner to twenty years' imprisonment each for manufacturing methamphetamine and possession with intent to distribute heroin; five years' imprisonment each for possession of methamphetamine and possession of crack cocaine; and six months' imprisonment for possession of a controlled substance. All of Petitioner's sentences were to be served concurrently.

Counsel then filed a motion for reconsideration of the sentence. A hearing was held on June 9, 2014. Judge Cooper reduced the twenty-year sentences for manufacturing

methamphetamine and possession with intent to distribute heroin to fifteen years each.

Petitioner filed a notice of appeal, which was perfected by the filing of a merits brief by LaNelle Cantey DuRant of the South Carolina Commission on Indigent Defense – Office of Appellate Defense. Petitioner raised two issues: (1) Whether the jury charge properly charged the jury on the required elements of manufacturing methamphetamine; and (2) whether the trial court properly denied Petitioner's motion for a mistrial. Petitioner's convictions were affirmed in a *per curiam*, unpublished opinion filed on December 14, 2016. The remittitur issued on December 30, 2016.

Petitioner timely file an application for post-conviction relief on July 28, 2017, with amendments filed August 14, 2018, and November 14, 2018. An evidentiary hearing convened June 19, 2019, at the Richland County Courthouse, before the Honorable Jocelyn Newman. Petitioner was present and represented at the hearing by Tricia Blanchette, Esquire. Petitioner and trial counsel testified at the hearing. On May 16, 2019, by written order, the PCR court denied relief and dismissed the action with prejudice. Thereafter, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) SCRCP, on May 24, 2019, and a supplemental motion on June 6, 2019. By Order filed March 30, 2020, the PCR court denied Petitioner's motion to alter or amend in its entirety.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief and the denial of his motion to alter or amend the judgment. Petitioner filed a petition for writ of certiorari on December 4, 2020.

STATEMENT OF FACTS

On April 23, 2013, Richland County Sheriff's Department officers executed a search warrant on the home of Petitioner's mother, where he also lived. App. pp. 174-75. The basis for the warrant was a controlled buy that had previously been conducted at the house. App. pp. 66-68. Officers found Petitioner, Sara Brassell, and Joshua Johnson in the garage of the home, with a white rock substance in plain view in an ashtray between them. App. pp. 175-76. This substance was later determined to be crack cocaine. App. pp. 176, 329.

The search continued, and officers found what appeared to be a potential methamphetamine lab in Petitioner's bedroom. App. p. 180. Investigators also recovered cocaine, marijuana, valium, methamphetamine, and syringes filled with a liquid in Petitioner's bedroom. App. pp. 248-49, 255. The lead investigator on the narcotics team, Allison Ricardo, donned a hazmat suit to remove items from the scene. App. pp. 285, 287. She testified at trial there was a strong odor in the room, indicative of a recent cooking of methamphetamine. App. pp. 287, 289. She also recovered various items of equipment for cooking and storing methamphetamine, as well as stripped batteries and powder containing pseudoephedrine in a pill grinder. App. pp. 289-90, 295-97. Based on the condition of the various components, Ricardo determined the home was not an active cook site. App. p. 294. Investigator Ricardo called a hazardous materials cleanup crew to dispose of the toxic items pursuant to OSHA standards and training provided by DEA and SLED. App. pp. 292-93. Each item removed from the scene was documented and photographed, as it could not be accepted by the Sheriff's Department's lab. App. p. 293-93, 299.

In the garage, Investigator Chauncey Smith found a green box resembling a tackle box. App. pp. 195-96. After receiving consent from Petitioner to open it, Smith found individual packets of drugs, later determined to be heroin and crack cocaine. App. pp. 196-97, 324-26. Based on this

discovery, Brassell and Johnson, the two other individuals in the garage, were also charged with crimes related to crack cocaine. App. p. 197.

The items in the green box were tested by Tara Kinney, a chemist with the Richland County Sherriff's Department, and found to contain 1.25 grams of heroin and 0.18 grams of crack cocaine. App. pp. 315, 324-26. Additionally, investigators found spoons with white residue that tested as methamphetamine and weighed 0.08 grams. App. pp. 327-28. Kinney did not test the liquid in the syringes due to the hazard of the sharp needles. App. p. 327. The ashtray in the garage contained .02 grams of crack cocaine. App. p. 329. Another .04 grams of crack was also collected and tested. App. p. 329. Seven tablets of diazepam, also called Valium, were also recovered and tested. App. p. 330.

Petitioner was detained, hand cuffed, and investigators read Petitioner his Miranda warnings, after which Petitioner signed a waiver of rights and gave a statement. App. pp. 177-78, 237-38, 242-43. In that statement, he claimed ownership of all of the drugs, stated the liquid in the syringes was methamphetamine, and admitted he used all of the drugs. App. pp. 253-56.

STANDARD OF REVIEW

The standard of review for PCR 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, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). 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 PCR court when controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts Counsel was ineffective for failing to properly convey the State's guilty plea offer of a "straight up" plea to possession of heroin with intent to distribute - second offense to Petitioner where Counsel was on notice Petitioner wanted a guilty plea offer with the potential to have the entire sentence suspended upon completion of the drug court program The PCR court correctly found Counsel was not constitutionally ineffective in conveying this offer where Counsel repeatedly and credibly testified he fully understood the State's offer for a straight up plea and he conveyed the offer to Petitioner. App. pp. 686-88.

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 PCR action, and when alleging 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 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." Id.

In a situation in which a plea offer is conveyed but rejected due to alleged ineffective assistance of counsel, the two-prong Strickland test for deficiency and prejudice still applies. Lafler v. Cooper, 566 U.S. 156, 162-63 (2012). To show deficiency, a defendant must prove counsel's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. However, in order to prove prejudice

> 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.

Lafler, 566 U.S. at 164.[1]

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). The PCR court's credibility findings are entitled to great deference on appeal. Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) ("[W]e defer to the PCR court's credibility findings as to witnesses who testified before the PCR court. . . ");

[1] "The correct remedy in these circumstances... is to order the State to reoffer the plea agreement. Presuming [Petitioner] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." Lafler, 566 U.S. at 174.

Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

The PCR court correctly found trial counsel was not constitutionally ineffective in relaying an offer to plead guilty without recommendation or negotiation to possession of with intent to distribute heroin – second offense to Petitioner where Counsel credibly testified he understood the terms of the offer and would have discussed it with Petitioner.

Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to properly convey the State's guilty plea offer of a "straight up" plea to possession of heroin with intent to distribute - second offense. However, the PCR court found Counsel's testimony on this issue to be more credible than Applicant's. App. p. 684. Accordingly, the PCR court's findings on this issue are owed "great deference," and are not based on any errors of fact or law, and therefore, this Court should deny certiorari on this issue. Goins, 397 S.C. at 573, 726 S.E.2d at 3 ("The PCR court's findings on matters of credibility are given great deference by this Court."). Because the PCR court correctly denied relief, this Court should likewise deny certiorari.

Testimony from Counsel at the evidentiary hearing established three plea offers made by the State in Petitioner's case: first, a negotiated ten-year sentence; second, a "straight up" plea

without negotiation or recommendation to PWID heroin - second offense; and third, PWID heroin - second offense with a recommended cap of ten years. App. p. 669-70, 674. Petitioner testified he was only aware of one offer for ten years to be served at eighty-five percent. App. p. 656. On the other hand, Counsel repeatedly and credibly testified he understood the second offer *could* have resulted in a suspended sentence for Petitioner, and, although he did not have a specific recollection of their conversation, he spoke to Petitioner many times in the days leading up to trial, and he would have conveyed this offer to Petitioner. App. pp. 606, 613, 615, 669-70, 674. The PCR court specifically found Counsel's testimony on this issue more credible than Petitioner's. App. p. 684.

However, Counsel and Petitioner were also both aware the State would not agree to any suspended sentence or diversion program like Drug Court; the State would ask for an active sentence of at least ten years; and the State would argue Petitioner was selling drugs, not merely using them. App. pp. 505-06, 566, 602, 638-39. Instead of risking a significant sentence from an open plea, Petitioner chose to go to trial because he wanted the chance to prove he was simply an addict and a user, not a drug dealer.[2] App. p. 654. Based on Counsel's credible testimony he conveyed the offer and discussed the merits of it with Petitioner, the PCR court correctly found Counsel was not deficient, and denied relief. App. pp. 613-14, 674, 684.

Petitioner also failed to meet his burden as to prejudice because he has failed to prove the plea court would have accepted the offer and "the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler, 566 U.S. at 164. In this case,

[2] As the assistant solicitor pointed out during the resentencing hearing, she offered him a cap of ten years which he rejected, "perhaps... because the trial he went to for trafficking crack cocaine back in... 2004, he got the minimum which was three years." App. p. 491.

there is no evidence in the record to support an assertion that Petitioner would have received a sentence less than the fifteen years ultimately imposed by pleading guilty "straight up" to the PWID heroin – second offense, and certainly no evidence to support an assertion Petitioner would have received a suspended sentence upon completion of a Drug Court program. Petitioner argues the "straight up" plea offer was the best offer from the State, despite the fact that the State could recommend any amount of time it wanted up to the maximum penalty of thirty years. See State v. Rikard, 371 S.C. 295, 302, 638 S.E.2d 72, 76 (Ct. App. 2006) ("It is axiomatic that the phrase 'without negotiations or recommendation' means that the State and the defendant have not agreed on sentencing. Therefore, either party is free to request a favorable sentence."). Counsel, however, characterized the State's third offer, to PWID heroin – second offense with a recommended cap of ten years, as Petitioner's best offer. App. pp. 484-85. However, Petitioner adamantly refused to accept a plea agreement carrying ten years – the minimum sentence he faced after a conviction at trial anyway. App. pp. 602, 659-60.

Even if Petitioner had agreed to enter an open plea to a second offense, it is unlikely he would have received a sentence less than the fifteen years ultimately imposed. Petitioner has an extensive criminal history and by his own admission, he has been "in and out of prison obviously all [of his] adult life," and has multiple prior drug convictions for possession and trafficking crack cocaine and possession and distribution or manufacturing methamphetamine. App. pp. 465-67, 637. More importantly, Judge Cooper clearly made his feelings regarding serious drug offenses known during the reconsideration hearing, noting the legislature set high penalties for these types of crimes because "if they can't stop it one way, they provide means to stop it another way. . . ." and noting he had recently imposed a twenty-year sentence for a second offense in a similar case. App. pp. 489-90. He also noted Petitioner "had so many chances to take a different fork in the

road," but had failed to do so. App. p. 480. Although the law would have allowed Judge Cooper to suspend Petitioner's sentence as a second offense, the judge's remarks at sentencing and during the reconsideration hearing make clear he was not amenable to doing so. Therefore, in this instance, Petitioner's conclusory assertion a straight up plea to PWID heroin – second offense would have resulted in a lower sentence is insufficient to support his burden of proving prejudice. PWC pp. 11-12. Accordingly, the PCR court correctly denied relief, and this Court should likewise deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari. However, should this Court grant certiorari, Respondent requests permission to fully brief the issues discussed herein.

Respectfully submitted,

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