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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Derham Cole, Trial Judge
The Honorable H. Steven DeBerry, IV, PCR Judge

Appellate Case No. 2021-001068

SAM BUNCH. ..... Petitioner.

v.

STATE OF SOUTH CAROLINA. ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Statement of Issue on Certiorari

Whether trial counsel provided ineffective assistance of counsel by failing to seek to reduce Petitioner's charges?

Respondent's Counterstatement of Issue on Certiorari

Did post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failure to reduce Petitioner's charges because, even if this issue was preserved, Petitioner entered an otherwise valid plea to the charges as stated, there was no showing that the charges were improper and should have been dismissed and there was no evidence Petitioner would not have pled guilty and proceeded to trial or would have received a lesser sentence or time cut?

STATEMENT OF THE CASE

Sam Bunch (hereafter "Petitioner") was charged with possession with intent to distribute cocaine within one-half mile of a school (2018-GS-42-04545), possession with intent to distribute marijuana (2018-GS-42-04546), possession with intent to distribute cocaine, third offense (2018-GS-42-04547); resisting arrest (2018-GS-42-04548); possession with intent to distribute cocaine base, third offense (2018-GS-42-04549), possession with intent to distribute marijuana within one-half mile of a school (2018-GS-42-04550), and possession with intent to distribute cocaine base within one-half mile of a school (2018-GS-42-04551). Petitioner was represented by James A. Cheek, Esquire (hereafter "Counsel"). Assistant Solicitor Tatyana Stepanova Ustimchuk, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On August 29, 2018, Petitioner pled to before the Honorable J. Derham Cole, circuit court judge, as indicted on all charges with a recommendation of concurrent sentencing and the cocaine and cocaine base charges being dropped from third to second offenses. Judge Cole sentenced Petitioner to imprisonment for concurrent terms of five years for PWID cocaine within a half-mile, five years for PWID marijuana, twenty years for PWID cocaine, one year for resisting arrest, ten years for PWID cocaine base, five years for PWID marijuana within a half-mile, and ten years for PWID cocaine base within a half-mile. Petitioner did not appeal his conviction or sentence.

Petitioner timely filed a PCR application on April 22, 2019. Respondent made its return on June 12, 2019. The evidentiary hearing occurred on August 3, 2021, before the Honorable H. Steven DeBerry, IV, circuit court judge. Rodney W. Richey, Esquire was Petitioner's attorney. Chelsey F. Marto, Esquire of the South Carolina Attorney General's Office represented Respondent.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on September 9, 2021. Petitioner appeals from the denial of relief based upon the allegation that Counsel was ineffective for failing to seek a reduction in Petitioner's charges.

STATEMENT OF FACTS

On June 30, 2018, Officer Lawrence Smith was on foot patrol when he saw Petitioner, whom he knew had a warrant out for his arrest. (App. 13). Deputy Smith approached Petitioner, told him he was under arrest, and told him to put his hands behind his back. (App. 13). Petitioner failed to comply and attempted to flee. (App. 13). Officer Smith subdued Petitioner after a brief scuffle and placed him in handcuffs. (App. 13). Officer Smith performed a search on Petitioner's person, which revealed a field weight of seven grams of marijuana, two scales, a purple Crown Royal bag containing five clear baggies with an off-white substance and multiple bills consisting of various denominations. (App. 13-14). The drugs found on Petitioner consisted of 5.95 grams of marijuana, two baggies containing .12 grams of cocaine, and one baggie containing .30 grams of cocaine base. (App. 14).

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 (2018). Overall, reviewing courts "give[] great deference to the PCR 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 petitioner shouldering the burden of proof. 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). 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 only if no probative evidence to support the findings. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts only conduct a *de novo* review if evaluating questions of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failure to get Petitioner's one-half mile proximity charges dismissed. This specific issue was not raised in the circuit court and is not properly preserved on appeal. However, even if this Court finds that this issue is preserved, Respondent contends that Counsel was not deficient because there were no grounds for an outright dismissal of the charges, Petitioner was entitled to plead to charges he did not commit to enjoy the benefit of a favorable plea offer, and no showing this alleged deficiency impacted Petitioner's decision to plead or the sentence itself. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

At the PCR hearing, Petitioner alleged Counsel was ineffective for failing to reduce his possession with intent to distribute charges to simple possession charges. (App. 46-49). Now for the first time on appeal, Petitioner alleges Counsel was ineffective for failing to move to dismiss the one-half mile of a school or park charges dismissed outright. Because the claim now raised was never raised in the post-conviction relief court, it is not preserved for this Court's review. *Plyler v. State*, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) ("On certiorari to this Court, Plyler raises the issue of whether trial counsel was ineffective for failing to object to an erroneous malice charge. Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred."); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) ("The appellant asserts representation was ineffective because her trial counsel did not object that the sentences constituted cruel and unusual punishment. This point was not raised in her application or at the hearing and is not properly before us.").

Here, Petitioner never raised or otherwise presented the claim that Counsel was

ineffective for failing to dismiss the one-half mile of a school or park charges. This issue was not before or addressed by the circuit court and, accordingly, this issue is not properly before the Court and is hardly an extraordinary case where preservation deficiencies should be overlooked in the interest of justice.

Further, Counsel was not ineffective on this ground. When a petitioner asserts ineffective assistance of counsel as a ground for relief, they must show "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 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

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. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant because 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.

In the context of a guilty plea, the petitioner must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *See also Blackledge v. Allison*, 431 U.S. 63, 73-74 (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."). "A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial." *Wolfe v. State*, 326 S.C.158, 485 S.E.2d 367 (1997); *accord Hill v. Lockhart*, 474 U.S. 52 (1985); *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001). Absent valid reasons why the petitioner is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v.*

State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

To show prejudice, the petitioner is required to show that the deficiency would have affected counsel's advice to accept the plea bargain or cause petitioner to decline accepting the bargain. *See Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009) (quoting *Hill*, *supra* and discussing the prejudice prong). This requires more than the bare assertion that "but for" the deficiency, petitioner would not have pled guilty, but gone to trial instead. *Id.* at 563, 681 S.E.2d at 594-595.

The Fourth Circuit has recognized that determining prejudice is an objective inquiry depending "on the likely outcome of a trial had the defendant not pleaded guilty." *Meyer v. Banker*, 506 F.3d 358, 369 (4th Cir. 2007); *see Hooper v. Garraghty*, 845 F.2d 471, 475 (4th. Cir. 1988) (noting despite focus on a subjective inquiry in *Lockhart*'s prejudice standard, the answer to the prejudice inquiry "must be reached through an objective analysis.").

To show prejudice in the context of a guilty plea, a PCR applicant must show that he would not have pled guilty but for counsel's errors and "must convince the court that such a decision would have been rational under the circumstances." *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (internal quotation marks omitted) *cert denied*, 134 S.Ct. 999 (2014) citing *Padilla v. Kentucky*, 559 U.S. 356, 372 (2009). "The challenger's subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts." *Fugit*, at 260.

Petitioner's plea was entered freely, voluntarily, intelligently, and knowingly. Petitioner stated he understood the charges and indictments and that he was informed of the charges and possible sentencing ranges involved in each charge. (Tr. 4). He advised he told Counsel all

relevant facts associated with the charges and that he and Counsel talked about the fact that he did not have a plausible defense. (Tr. 4). Petitioner waived presentment of the charges before the grand jury. (Tr. 5). He also confirmed he knew he was waiving his rights, including the right to remain silent, to call and confront witnesses, and to proceed to a jury trial. (Tr. 5-7). He advised no one threatened, promised, or coerced him into pleading, that it was being freely and voluntarily entered, that he wanted to plead guilty because he was guilty of all charges pled to, and that he understood the sentencing ranges and fines. (Tr. 7-9). Petitioner stated he understood the serious offense distinction associated with his main charge. (Tr. 7-9). After this, Petitioner advised he still wanted to plead guilty. (Tr. 9). Petitioner denied he has not used drugs the fifty days he has been in jail leading up to the plea hearing, that his addiction nor his paranoid schizophrenia did not impact his ability to understand the plea, that his mental health is not as severe as it used to be, and the last time he took medication under a doctor's care in 1996. (Tr. 11-13). Thus, the plea transcript indicates that Petitioner knowingly, intelligently, freely, and voluntarily entered his plea to the charges as stated by the State.

Concerning Petitioner's allegation that Petitioner was arrested over a half-mile of a school or park, beyond pointing to a line in the plea transcript showing that the difference between the two points was clocked at .6 miles, Petitioner has failed to show that the difference between the two lines exceeded .5 miles when drawn in a straight line. *Brown v. State*, 333 S.C. 238, 241, 510 S.E.2d 212, 213 (1998) (holding that "the only way to uniformly measure the distance between a school, church or other protected location where illegal drugs were sold is to do so in a straight line"). Petitioner has failed to establish the distance exceeded what is dictated by statute and Respondent contends that when measured by radius, Petitioner was within one-half mile of a school or park at the time of the incident, and a dismissal of these charges would

be inappropriate. *Id.* at 241, 510 S.E.2d at 214 (finding that Petitioner failed to meet his burden of proof when failing to show that the distance exceeded one-half mile when measured in a straight line).

Even if the incident location was over a half-mile away from a school or park, it remains settled law that defendants can plead guilty to a charge they are not guilty of to capitalize on a favorable plea offer. *See Rollinson v. State*, 346 S.C. 506, 552 S.E.2d 290 (2001) (where the defendant plead guilty to second offense drug charge at the same time as first offense charge as part of a plea negotiations to drop three other charges); *Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000) (finding a defendant indicted for murder may accept plea bargain and plead guilty to voluntary manslaughter even though the facts do not support a lesser charge). Counsel is not deficient for declining to challenge proper charges supported by the evidence when Petitioner entered a valid plea to the charges to capitalize on a favorable plea offer.

Petitioner failed to establish any prejudice. Petitioner agreed with the prosecutor's assertion that the locations were .6 miles apart and still decided to proceed forward with his plea and should not be permitted to withdraw it now. Petitioner received a favorable offer to lesser-included offenses where he received fifteen years' less active time than the mandatory minimum at trial would have allowed. Petitioner has made no showing that he wants his plea vacated and would have preferred to proceed to trial. Instead, Petitioner seems to be requesting this Court grant him a sentence reduction, which is not a proper form of relief in PCR Court. *See Smith v. State*, 413 S.C. 194, 195, 775 S.E.2d 696, 696 (2015) ("We now clarify the proper remedy is a new trial."); *Gilstrap v. State*, 252 S.C. 625, 168 S.E.2d 88 (1969) (finding that, if entitled to relief, petitioner would not be afforded absolute relief, but a new trial); *Grant v. MacDougall*, 244 S.C. 387, 391, 137 S.E.2d 270, 272 (1964) (relief of absolute release not available). Finally,

because the charges in dispute on appeal are proper and could not have been dismissed on that basis, there was no grounds for dismissal and can be no prejudice as a result. Accordingly, relief should be denied on this ground.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had 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,

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