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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County
The Honorable G. Thomas Cooper, Jr. Post-Conviction Relief Judge
The Honorable R. Keith Kelly, Plea Judge

Appellate Case No. 2020-000882

FRANCISCO R. RODRIGUEZ, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

South Carolina Rules and Statutes:

STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issue of Certiorari

Did the PCR judge err in finding that Petitioner suffered no prejudiced from plea counsel's failure to advise that the *Alford* plea would result in mandatory deportation and a permanent ban on reentry into the United States?

Respondent's Counterstatement of Issue of Certiorari

Did the post-conviction relief court properly find Petitioner failed to establish prejudice, where plea counsel informed him what an *Alford* plea is, advised him there would be deportation consequences regardless of whether he pled guilty or was found guilty at trial, and where Petitioner's determinative factor for pleading was because he did not want to risk a possible conviction on the first-degree criminal sexual conduct charge and the twenty-five year maximum sentence that could result therefrom?

STATEMENT OF THE CASE

During its November 2014 term, the Spartanburg County Grand Jury indicted Petitioner for one count of first-degree criminal sexual conduct with a minor (2015-GS-42-03396) and one count of third-degree criminal sexual conduct with a minor (2015-GS-42-03397). Petitioner was represented by Joseph R. Baldwin, Esquire. Assistant Solicitor Lindsey H. Overby of the Seventh Circuit Solicitor's Office prosecuted the case. On April 12, 2016, Petitioner appeared before the Honorable R. Keith Kelly and pleaded guilty as indicted to third-degree criminal sexual conduct with a minor, without recommendation from the State, pursuant to *North Carolina v. Alford*[1]. In exchange for Petitioner's guilty plea, the State agreed to dismiss the count of first-degree criminal sexual conduct with a minor. Judge Kelly sentenced Petitioner to fifteen years' imprisonment and required him to register as a sex offender. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed a timely application for post-conviction relief, alleging various claims of ineffective assistance of counsel. On October 10, 2019, an evidentiary hearing convened before the Honorable G. Thomas Cooper at the Spartanburg County Courthouse. Petitioner was present and represented by counsel Lydia Angelica Hernandez. Petitioner testified, as well as, Petitioner's plea counsel, Joseph Baldwin, Esquire. Julianna Sucuchi, interpreter for Petitioner, was also present at the evidentiary hearing. By order filed May 11, 2020, Judge Cooper denied and dismissed the application.

On December 3, 2020, Petitioner filed a Petition for Writ of Certiorari. Respondent filed a Return to Petition for Writ of Certiorari on April 19, 2021. Pursuant to Rule 243(1) of the South Carolina Appellate Court Rules, this post-conviction relief appeal was transferred to the South Carolina Court of Appeal on May 12, 2021. This appeal follows.

[1] 400 U.S. 25 (1970).

STATEMENT OF FACTS

In November 2014, the Spartanburg County Sheriff's Office received a report concerning alleged unlawful sexual conduct with a minor involving Petitioner and a nine-year-old child his ex-wife babysat. (App. 11). Months after the incident occurred, the victim came forward by writing a letter to her parents after attending a church program regarding inappropriate touching. (App. 11). In the letter, the victim alleged the babysitter, Petitioner's ex-wife, went to Walmart, and during that time, Petitioner inappropriately touched her. (App. 11). When the report was submitted, victim disclosed the abuse to a responding officer, after which she was referred to the Children's Advocacy Center for a forensic interview. (App. 11).

The victim disclosed multiple incidents of abuse. (App. 12). She disclosed that at least one incident involved oral sex at the babysitter's home, where Petitioner removed her pants and put a pillow over her eyes. (App. 11-12). Additionally, the victim disclosed multiple incidents where Petitioner fondled the victim's genitals and digitally penetrated her. (App. 12). During these instances, sometimes the babysitter was present but not paying attention and other times she was out of the house. (App. 12). There was one other incident of oral sex that occurred at an unknown location, probably in Greenville County. (App. 12). The date range of these incidents remains unknown, but one incident occurred around the victim's seventh birthday and another incident occurred when the victim was in the second grade. (App. 13). The victim reported she was pretty sure everything happened during the spring and summer months of 2014. (App. 13).

A search warrant was executed at Petitioner's residence and photographs of the outbuilding on property were taken upon the warrant's execution. (App. 12). Law enforcement seized multiple movies and electronic devices, including cameras from a bedroom the victim described as the location of the abuse. (App. 12). Although though no illegal material existed on these videos, they

corroborated the victim's story, primarily through showing footage from the bedroom that was set up like the victim described and where she said the abuse occurred. (App. 12-13). Petitioner was interviewed by law enforcement and, in the interview, stated that his wife babysat the victim for a three-to-four-month period. (App. 13). However, Petitioner consistently denied the abuse.

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 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), 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 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 only 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

The post-conviction relief court properly found Petitioner failed to establish prejudice, where plea counsel informed him what an *Alford* plea is, advised him there would be deportation consequences regardless of whether he pled guilty or was found guilty at trial, and where Petitioner's determinative factor for pleading was because he did not want to risk a possible conviction on the first-degree criminal sexual conduct charge and the twenty-five year maximum sentence that could result therefrom.

In Petitioner's Brief, he asserts the post-conviction relief court erred in refusing to find prejudice where counsel did not explicitly advise Petitioner that an *Alford* plea would result in mandatory deportation and a permanent ban on reentry into the United States. Petitioner argues he did not have a full understanding of the consequences of the plea and given Petitioner's "familial connections," there is a "reasonable probability that absent counsel's error, Petitioner would have risked trial instead of entering the plea and facing certain deportation." (Brief of Petitioner, 4). Petitioner further asserts, though an interpreter was present to translate the proceedings of the plea, no interpreter was present when Petitioner consulted counsel alone regarding his case. Petitioner states counsel did not advise him, by pleading, he would be banned completely from ever reporting legal status in the United States. Critically, during Petitioner's evidentiary hearing, counsel made clear Petitioner's determinative factor in taking the plea was the shortened sentence, not any deportation consequences. (App. 102).

Therefore, while the post-conviction relief court found counsel was deficient for failing to advise Petitioner that the *Alford* plea would result in mandatory deportation and a permanent ban on reentry into the United States, they did not err in refusing to find prejudice, where the immigration consequences of the *Alford* plea were of no consideration to Petitioner, rather the potential time incarcerated was the determinative factor. Consequently, this Court should affirm the post-conviction relief court's findings in full.

Standard and Burden of Proof

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*. With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687; *Harrington v. Richter*, 562 U.S. 86 (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. 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.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart* extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. 474 U.S. 52 (1985); see *Padilla v. Kentucky*, 559 U.S. 356 (2010) (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel).

When reviewing a guilty plea, the analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id*. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*.

at 59. This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 198 L. Ed. 2d 476, 137 S. Ct. 1958 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372.

Surmounting *Strickland's* high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. *Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. at 134, 318 S.E.2d 360 (1984).

Petitioner Failed to Prove He Was Prejudiced and Failed to Prove But For Counsel's Deficiency He Would Have Proceeded to Trial

Here, Petitioner was not prejudiced by any deficiency of counsel, despite Petitioner, arguing he would have proceeded to trial had he been made aware of all the consequences of the plea. Petitioner asserts that while the post-conviction relief court properly found counsel was deficient for failing to explicitly state Petitioner would be deported if he pleaded guilty, the post-conviction relief court improperly found the claim failed because Petitioner was prejudiced by counsel's deficiency.

In support of Petitioner's assertion counsel failed to advise him that the *Alford* plea would result in mandatory deportation and a permanent ban on reentry into the United States, Petitioner

testified counsel only told him there was a possibility he would be deported. (App. 85). Petitioner argues, because of this erroneous advice, and counsel's failure to fully advise Petitioner of the immigration consequences of a plea, Petitioner's plea was not made freely and intelligently, and he is entitled to a new trial.

After hearing Petitioner's testimony at the evidentiary hearing, in conjunction with counsel's testimony and a thorough review of the record, the post-conviction relief court found counsel's performance deficient, but rejected Petitioner's claims of prejudice. Specifically, the post-conviction relief court found Petitioner did not suffer prejudice, as he would have taken the plea, regardless of whether counsel provided a more concrete answer regarding immigration consequences of the plea.

At Petitioner's evidentiary hearing, counsel testified he discussed with Petitioner the trial strategy he would have used if Applicant did not accept the plea and testified that he explained to Petitioner what an *Alford* plea was to Petitioner a day or two before the plea hearing. (App. 99-100). During this discussion, according to counsel, Petitioner was engaged and discussed the sentences others with similar offenses had received. (App. 100-101). When asked if he wanted to proceed to trial, Petitioner, without prompting or conferring with counsel, said, "No. I want an *Alford*." (App. 7). Moreover, when asked if he wanted to enter an *Alford* plea, Petitioner said he did. (App. 8). When asked if he knew the plea would be treated like a guilty plea, Petitioner said he did. (App. 8). When the Judge asked if he was receiving a beneficial result by accepting the *Alford* plea, he conceded he was without conferring with counsel. (App. 8). He said no one forced him to plead, no one talked him into pleading, and that he had plenty of time to talk with his lawyer. (App. 9). Though he initially voiced dissatisfaction with counsel not investigating witnesses, after

conferring with counsel, he stated that he thought counsel did everything he could for him, and there was nothing else he thought that counsel should have done but failed to. (App. 10).

When the solicitor read the facts, Petitioner readily conceded that the solicitor could present those facts to a jury and the jury, based upon those facts, would likely convict him. (App. 13). Petitioner also spoke to the judge himself at the plea hearing and, after having the entire hearing interpreted for him, never told the judge he did not want to plead. (App. 8-10, 13-14).

Counsel additionally testified Petitioner told him he did not want to proceed to trial because he did not want to risk the possibility of a twenty-five-year sentence. (App. 102). At Petitioner's evidentiary hearing, counsel testified he and Petitioner discussed which parts of the discovery weakened their case and that Petitioner was engaged and cooperative throughout the meetings when they reviewed discovery. (App. 94-95). Counsel stated he told Applicant after service of the sentence, immigration officials would probably use the conviction to deport him from the country, regardless of whether he pled guilty or proceeded to trial. (App. 102). Counsel stated he told Applicant that his conviction would be used against him as a reason to deport him and he believed Applicant wanted to plead pursuant to *Alford* because Applicant was concerned about facing twenty-five years' imprisonment if found guilty at trial. (App.102, 105-106). Further, counsel testified Applicant never indicated he wanted a trial while talking with counsel at the hearing. (App. 105). Counsel testified he thought Applicant understood him regarding his analysis of the case and the plea agreement, including the strengths and weaknesses of the case and what an *Alford* plea is. (App. 112-114).

Based on the entirety of counsel's testimony deemed credible[2] by the post-conviction relief court, the post-conviction relief court found Applicant was aware of the details of the plea, including the rights he was giving up, the nature of the charge, the right to raise defenses, and what an *Alford* plea is. Additionally, the post-conviction relief court found Petitioner did not want to risk a possible conviction on the first-degree criminal sexual conduct charge and the twenty-five year maximum sentence that could result therefrom. (App. 102).

Most importantly, Petitioner never testified that if counsel told him deportation was mandatory in his case he would have proceeded to trial. Petitioner never stated he would not have pled but for this deficiency. Thus, Petitioner has not met his burden of proof in showing he was prejudiced by any lack of information given to him regarding immigration consequences. See *Taylor v. State*, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) (stating that to show prejudice, the applicant must show that but for counsel's error Applicant would have proceeded to trial).

While in *Padilla v. Kentucky*, the United States Supreme Court held that effective assistance of counsel inherently requires communicating the risk of deportation upon conviction to a non-citizen defendant. 559 U.S. 356, 367 (2010). Ineffective assistance of counsel is easily found if counsel falsely assures the [Petitioner] he will not be deported by taking a plea. Id. at 368; *Lee v. U.S.*, 137 S.Ct. 1958, 1964 (2017). In *Padilla*, the Supreme Court also held that there will

[2] On appeal, the South Carolina Supreme Court gives great deference to a PCR judge's findings where matters of credibility are involved. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (Citing *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)); *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…"); *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."); *Foye v. State*, 335 S.C. 586, 589, 518 S.E. 265, 267 (1999) ("Where matters of credibility are involved, this Court gives great deference to the judge's findings, because this Court lacks the opportunity to directly observe the witnesses.").

"undoubtedly be numerous situations in which the deportation consequences of a plea are unclear." *Padilla*, 559 U.S. at 367. When this is the case, the attorney only needs to "advise a noncitizen client that pending criminal charges may carry adverse immigration consequences." *Id*. However, "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id*. An applicant can establish prejudice if he shows that, if he knew about the deportation risk, he would not have accepted a plea bargain, but would have gone to trial. *Lee v. U.S.*, 137 S.Ct. at 1966-67.

Regarding guilty pleas, specifically, the applicant 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 *Kovacs v. U.S.*, 744 F.3d 44, 52 (2d Cir. 2014) (The court held that a defendant was prejudiced if, "but for counsel's unprofessional errors, there was a reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status'). The applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the solemnity and truthfulness inherent in the plea proceeding. See *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."). Absent valid reasons why the applicant is entitled to depart from admissions made at the plea hearing, sworn 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)).

However, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id. at 1967. In *Lee*, the court granted applicant relief because counsel explicitly told Lee that he would not be deported if he pled guilty, and both Lee and counsel testified that deportation was the determinative factor in the decision-making process leading to the guilty plea. *Id*. at 1962, 1967. It is necessary an applicant demonstrates both a resolute intent to structure plea agreement that avoided immigration, and show a reasonable probability prosecution would have accepted, and the court approved, a deal with no adverse effect on immigration status. *U.S. v. Swaby*, 855 F.3d 233, 242 (4th Cir. 2017). Additionally, in *Kovacs*, Kovacs demonstrated his "single minded focus" in plea negotiations on avoiding immigration consequences, and the government and his attorney settled on the criminal charge based solely for the reason his attorney believed it would not impair Kovacs' immigration status. 744 F.3d 44 at 53.

Other considerations a court takes in determining prejudice, is the strength of a state's case against a defendant "inasmuch as a reasonable defendant would surely take into account". *Ostrander v. Green*, 46 F.3d 347, 356 (4th Cir. 1995), overruled on other grounds by *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). The likelihood of acquittal if a defendant went to trial may establish prejudice, but where state has a strong case and defendant makes decision to plea based on that, prejudice is unlikely. *Id*.

Here, because counsel failed to explicitly state Petitioner would be deported if he pled, the post-conviction relief court found counsel acted deficiently. However, there is no indication Applicant was prejudiced by this deficiency, as Petitioner made clear the determinative factor in taking the plea was the shortened sentence, not any potential deportation consequences. (App.

102). Furthermore, the record clearly establishes Petitioner was aware of the details of the plea and what an *Alford* plea is.

Petitioner did not demonstrate his resolute intent to plead was based on avoidance of immigration consequences. Moreover, because the testimony of Petitioner fails to demonstrate he was prejudiced by counsel's deficiency and because Petitioner fails to show a reasonable probability that, but for counsel's errors, he would have proceeded to trial, he is not entitled to relief. See *Harrington*, 562 U.S. 86 (noting that to establish the necessary prejudice to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate a reasonable probability the result of the proceeding would have been different but for counsel's error).

Accordingly, Petitioner has not met his burden of proof as to prejudice and shown but for counsel's deficiency he would have proceeded to trial. Therefore, this Court should deny relief.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's findings in full.

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