STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Eugene C. Griffith, Circuit Court Judge

ANGELO H. TAYLOR,

RESPONDENT,

V.

THE STATE.

PETITIONER.

APPELLATE CASE NO. 2022-001571

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge correctly find that the guilty plea was rendered involuntary by plea counsel's erroneous advice as to "parole eligibility"?

PETITIONER'S QUESTION PRESENTED

Did the PCR court err in finding that Taylor proved that plea counsel was constitutionally ineffective for giving inaccurate advice about Taylor's parole eligibility when the court found that Taylor satisfied his burden merely because his testimony was not contradicted, which constituted a legal error and improperly shifted the burden of proof?

STATEMENT OF THE CASE

According to the indictments,[1] on February 13, 2018, the Greenville County Grand Jury indicted Respondent, Angelo Horace Taylor, for murder and attempted armed robbery, indictments #2016-GS-23-2378, 2379. (App. pp. 392-393; 396-397). On September 18, 2018, Respondent proceeded to jury trial before the Honorable Edward W. Miller. Carlyle Steele represented Respondent at trial. Elizabeth Major prosecuted the case. Jury deliberations began at 12:06 PM on September 19, 2018. (App. p. 354, line 1). At 2:29 PM the jury sent out a note that said, "The jury is unable to reach a consensus." (App. p. 354, lines 3-4). The judge asked the jury to continue to deliberate. (App. p. 354, lines 20-21). At 3:52 PM the jury sent a second note indicating deadlock. (App. p. 355, lines 5-6). The judge announced that he was going to give an Allen charge. (App. p. 355, lines 16-18). Counsel for Respondent objected to the Allen charge but failed to move for a mistrial pursuant to S.C. Code §14-7-1330.[2] The judge gave the Allen charge. (App. pp. 356-358). While the jury was deliberating, Respondent entered Alford[3] pleas to involuntary manslaughter and attempted armed robbery. Judge Miller sentenced Respondent to twenty (20) years for attempted armed robbery and five (5) years consecutive to involuntary manslaughter. Respondent did not appeal his sentence or conviction. (App.p. 390, 395).

On August 9, 2019, Respondent filed a *pro se* application for post-conviction relief [PCR]. (App. pp. 404-412). On January 7, 2020, the State filed a return and motion for more definite statement. (App. pp. 413-426). On March 10, 2020, PCR counsel filed an amended

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[1] The date listed below the witness name is December 5, 2015. The indictments are stamped as filed in the clerk's office on March 28, 2016. The 2016 term listed on one side of the indictment is scratched out and replaced with 2018. The indictment numbers start with 2016.

[2] This issue was not raised in post-conviction relief.

[3] North Carolina v. Alford, 400 U.S.25 (1970).

application. (App. pp. 427-428). On March 21, 2022, an evidentiary hearing was held, via WebEx, before the Honorable Eugene C. Griffith, Jr. Susannah Conyers Ross represented Respondent at the PCR hearing. Taylor Zane Smith represented the State. In a written order signed August 17, 2022, Judge Griffith granted relief and remanded for a new trial. (App. pp. 429-434). The order granting relief was filed on September 14, 2022. The State served a motion to alter or amend on September 21, 2022. Judge Griffith denied the motion on October 11, 2022. The notice of intent to appeal was served on November 7, 2022. The State filed a petition for writ of certiorari on March 22, 2023. This return follows.

ARGUMENT

The PCR judge correctly found that the guilty plea was rendered involuntary by plea counsel's erroneous advice as to "parole eligibility."

Respondent's trial for murder, possession of a weapon during the commission of a violent crime and attempted armed robbery started on September 18, 2018. Deliberations stated the next day at 12:06 PM. (App. p. 354, line 1). At 2:29 PM the jury sent out a note that said, "The jury is unable to reach a consensus." (App. p. 354, lines 3-4). The judge asked the jury to continue to deliberate. (App. p. 354, lines 20-21). At 3:52 PM the jury sent a second note indicating deadlock. (App. p. 355, lines 5-6). The judge announced that he was going to give an Allen charge. (App. p. 355, lines 16-18). Counsel for Respondent objected to the Allen charge but failed to move for a mistrial pursuant to S.C. Code §14-7-1330. Counsel's failure to move for a mistrial after the jury deadlocked twice was not raised during the PCR hearing. The judge gave the Allen charge. (App. pp. 356-358). While the jury was deliberating, Respondent entered Alford[4] pleas to involuntary manslaughter and attempted armed robbery. (App. pp. 358-363). Prior to accepting the plea, the judge did not question Respondent about his understanding of the maximum and minimum penalties and the nature of the charges to which he was entering Alford pleas. The judge sentenced Respondent to twenty (20) years for attempted armed robbery and five (5) years consecutive to involuntary manslaughter.

In the amended PCR application Respondent alleged, "ineffective assistance of counsel for advising the applicant the attempted armed robbery was charge that maxed out at 65% when it is an 85% charge . . ." (App. p. 427). During the PCR hearing when PCR counsel asked Respondent if plea counsel discussed the fact that the sentence for attempted armed robbery required service of eighty-five percent of the sentence, Respondent testified, "Well, he – at first

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[4] North Carolina v. Alford, 400 U.S.25 (1970).

originally he told me that I could get probation or I could, you know, get a different – a lesser sentence than 20 years, that it would be carried at 65 percent." (App. p. 371, lines 11-16). Respondent testified that he thought that he would have to serve sixty-five percent of the sentence imposed and he did not think he would receive consecutive time, as he did. (App. p. 371, lines 8-10). Respondent testified that he would not have pled if he had known that attempted robbery was classified as a violent offense and required service of eighty-five percent of the sentence. (App. p. 371, line 20 – p. 372, lines 1-13). On cross-examination Respondent testified, "He [counsel] told me that the charge that I was pleading to, that my time would carry 65 percent, so I would do a lesser amount of time incarcerated." (App. p. 373, lines 15-17).

Plea counsel testified at the PCR hearing that, **prior to trial**, he did not believe he discussed with Respondent the percentage of time he would have to serve if convicted of attempted armed robbery because the State had not yet made any plea offers and Respondent wanted a trial. (App. p. 376, lines 8-19). When asked if he ever told Respondent he would only have to serve sixty-five percent of the sentence imposed, counsel testified, "It's been three and a half years. It's been a while. I can't say we never had that discussion, but I can say I don't remember that discussion, and I don't believe we had that discussion." (App. p. 376, line 20 – p. 377, line 1). When asked if he believed that attempted robbery was categorized as a "no parole" offense, counsel testified, "Apparently it is." (App. p. 377, lines 8-10). On cross-examination counsel agreed that when Respondent heard the murder charge was being reduced to involuntary manslaughter, he may have thought he was looking at close to time served as he had been in jail for over 1,000 days awaiting trial. (App. p. 383, line 24 – p. 384, lines 1-3).

In the order granting relief the PCR judge wrote, "It is the finding of this Court that the Applicant demonstrated a deficiency of Counsel in this matter which was not cured by the plea

colloquy that gives rise to a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Therefore, he is entitled to post-conviction relief." (App. p. 433). As to deficiency, the PCR judge wrote, "As counsel's testimony did not contradict the Applicant, I find the Applicant's testimony that his guilty plea was based on inaccurate sentencing advise from counsel to be convincing." (App. p. 432). As to prejudice, the PCR judge wrote, "As to the 'prejudice' requirement of the *Strickland* test, the Applicant's uncontroverted testimony was that had he known the attempted armed robbery was an 85% charge, he would not have plead guilty and instead waited on the verdict of the jury that was actively deliberating at the time of his plea." (App. p. 433). The judge correctly granted relief.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

The PCR judge correctly found that the plea was based on inaccurate sentencing advice from counsel. The Respondent met his burden of proof as to both deficiency and prejudice. The

PCR judge did not shift the burden of proof to the State. Instead, the PCR judge made a factual finding that Respondent's testimony that his plea was based on inaccurate sentencing advice from counsel was convincing writing, "As counsel's testimony did not contradict the Applicant, I find the Applicant's testimony that his guilty plea was based on inaccurate sentencing advise from counsel to be convincing." (App. p. 432). Respondent unequivocally testified that counsel advised him that he would only have to serve sixty-five percent of his sentence. (App. p. 371, 373). Counsel's testimony about his advice to Respondent, on the other hand, was less certain. Counsel testified, "I can't say we never had that discussion, but I can say I don't remember that discussion, and I don't believe we had that discussion." (App. p. 376, line 20 – p. 377, line 1). Counsel also testified that attempted armed robbery was "apparently" a no parole offense. (App. p. 377, lines 8-10). The PCR judge's factual finding as to deficiency is supported by the record.

In Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018) (n. 2 omitted), the South Carolina Supreme Court wrote:

> Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

The PCR judge made a finding of fact that Respondent's testimony as to deficiency was convincing. Petitioner argues that by stating that counsel's testimony did not contradict the Applicant's testimony as to deficiency, the PCR judge committed an error of law by shifting the burden of proof to the State. The PCR judge, however, did not require the State to disprove Respondent's testimony, as argued by Petitioner. (Petition for Writ of Certiorari p. 16). Respondent met the burden of proof required. The deficiency finding by the PCR judge was not

a burden shifting error of law. Instead, the PCR judge made a finding of fact that the plea was based on the erroneous advice from counsel that attempted armed robbery[5] only requires the service of sixty-five percent of the sentence.

Petitioner correctly notes that the PCR court was not required to accept Respondent's testimony that he received erroneous sentencing advice from counsel. (Petition for Writ of Certiorari p. 17). In this case, however, the judge accepted Respondent's testimony, finding the testimony to be "convincing." There is evidence in the record to support the PCR judge's finding of fact as to deficiency. This Court should uphold the deficiency finding of the PCR court.

The PCR judge then addressed prejudice writing, "As to the 'prejudice' requirement of the *Strickland* test, the Applicant's uncontroverted testimony was that had he known the attempted armed robbery was an 85% charge, he would not have plead guilty and instead waited on the verdict of the jury that was actively deliberating at the time of his plea. This is the only evidence in the record on this point, and I find that it demonstrates prejudice to the Applicant. See *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (S.C. 1991)." (App. p. 433). In Jackson v. State, 342 S.C. 95, 97–98, 535 S.E.2d 926, 927 (2000), the South Carolina Supreme Court wrote:

> Petitioner testified he would not have pled had he known the charge was a felony. The PCR judge found petitioner's testimony was not credible. However, there was no evidence contradicting or conflicting with petitioner's testimony that would support the PCR judge's finding that petitioner would not have pled. In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), the PCR judge denied a petitioner relief when trial counsel erroneously advised the petitioner about his potential

[5]S C. Code §24-13-100 provides that a "no parole" offense means a class A, B, or C felony. Attempted armed robbery, S.C. Code §16-11-330(B), is a class C felony, S.C. Code §16-1-90(C), classified as a violent, most serious, no parole offense. S C. Code §24-13-150 provides that an inmate convicted of a no parole offense is required to serve at least eighty-five percent of the sentence.

> sentence prior to his guilty plea. We reversed and held the petitioner had satisfied the prejudice prong when "the only evidence in the record on this point [was] petitioner's own testimony that had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty." (citing Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (new trial granted where incorrect parole eligibility advice induced plea)).[2] Here, the only evidence was that petitioner would not have pled had he known the charge was a felony. Thus, petitioner was entitled to PCR.

There was no adverse credibility finding to overcome in the present case as there was in Jackson. Like Jackson, the only evidence in the present case is that Respondent would not have pled had he known that any sentence for attempted armed robbery required service of eighty-five percent of that sentence. This is especially true given the fact that Respondent only chose to enter pleas at the conclusion of the trial and while the jury was still deliberating. In footnote two the Court in Jackson wrote, "To the extent that Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), can be read to hold that a petitioner's statement is insufficient evidence to satisfy the prejudice prong, it is hereby overruled." 342 S.C. at 98, 535 S.E.2d at 927. There is evidence in the record to support the PCR judge's finding as to prejudice. This Court should uphold the prejudice finding of the PCR court.

The PCR judge correctly found that Respondent ". . . demonstrated a deficiency of Counsel in this matter which was not cured by the plea colloquy that gives rise to a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Therefore, he is entitled to post-conviction relief." (App. p. 433). The guilty plea was rendered involuntary by plea counsel's erroneous advice as to "parole eligibility." Respondent is entitled to relief.

CONCLUSION

Based on the above argument, this Court should deny the petition for writ of certiorari.

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Appellate Defender

ATTORNEY FOR RESPONDENT

This 20th day of April, 2023.