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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Judge
Appellate Case No. 2022-001395

DEANGELO BROWN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S ISSUE PRESENTED

The post-conviction relief court properly found that Petitioner's plea was voluntary.

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). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

During its November 2012 term, the Charleston County Grand Jury indicted Petitioner for possession with intent to distribute (PWID) heroin. Petitioner was subsequently indicted in December 2012 for resisting arrest, obstruction of justice and PWID Cocaine. Melissa Gay, Esquire, represented Petitioner. On April 13, 2016, Petitioner pled guilty as indicted to all charges before the Honorable R. Markley Dennis Jr. In exchange for the plea, the State dismissed a charge for felon in possession of a firearm. Judge Dennis sentenced Petitioner to imprisonment for fifteen years for PWID heroin, fifteen years PWID cocaine, three years for obstruction of justice, and one year for resisting arrest to run concurrently. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief on October 25, 2016. The State requested an evidentiary hearing that was held before the Honorable Jennifer B. McCoy on December 9, 2021. Testimony continued February 23, 2022. Petitioner was represented by Tommy Thomas, Esquire and the State was represented by Assistant Attorney General, Lauren Mims and Assistant Attorney General, Samantha Weidauer.

On May 9, 2022, Judge McCoy signed an order denying PCR. Petitioner made a motion to amend and reconsider on May 19, 2022. Judge McCoy denied Petitioner's motion on May 23, 2022. Petitioner filed a Petition for Writ of Certiorari on February 16, 2023. This return follows.

RELEVANT FACTS

At the plea hearing, the State presented the following factual basis for the plea, to which

Applicant agreed:

Just briefly, traffic stop in Mount Pleasant, Charleston County. The defendant was in possession, which he put in his mouth 21 baggies of drugs. Eighteen were cocaine. Three were heroin. He resisted arrest from Deputy Funsch and Rissanen. He was placed in the back of the police cruiser, at which point he put the drugs in his mouth; wouldn't give them up.

We had to take him to the hospital. He had them in his mouth for a couple of hours. Chewed a lot of them up. Spit a lot of product out, a lot of weight. And they located a scale, which is another indicator of attempt to distribute in the vehicle. He had \$174 on his person at the jail.

And in addition, we had some jail calls we planned to introduce where he talked about how he faked the seizure in the back of the car and how he had in excess of 10 grams of cocaine in his mouth at the time. There are all different factors we would use to prove his guilt.

App. 15-16.

ARGUMENT

The post-conviction relief court properly found that Petitioner's plea was voluntary.

Petitioner contends that the PCR court erred finding that Petitioner's guilty plea was voluntary where he relied on erroneous advice of defense counsel and where defense counsel now admits Petitioner could not have made a voluntary, knowing, and intelligent guilty plea based on the inaccurate advice she gave him. Petitioner's argument is without merit because trial counsel's performance was not deficient and even if it had been, Petitioner failed to show that he was prejudiced by this deficiency.

Ordinarily, PCR allegations are centered upon an allegation that the Petitioner did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the Petitioner's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Petitioner sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence

or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The Petitioner has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the Petitioner must establish that, in light of all the circumstances, the acts or omissions complained of “were outside the wide range of competence” demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the Petitioner must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel’s performance under the first prong of *Strickland* remains unchanged—the Petitioner must show that counsel’s representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An Petitioner alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel’s advice to plead guilty was not “within the competence demanded of attorneys in criminal cases.” *Hill*, 474 U.S. at 56.

The second, or “prejudice” prong, however, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* Specifically, when an Petitioner claims counsel’s deficient performance caused him to accept a plea, the Petitioner “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. The Petitioner must further convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372.

This inquiry “focuses on a defendant’s decision making” 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*, 582 U.S. 357, 137 S. Ct. 1958, 1966 (2017). However, an Petitioner 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. The question here is whether the Petitioner, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

During Petitioner’s plea, Counsel advised the plea court she had an adequate opportunity to fully discuss the charges with Petitioner, Counsel was satisfied Petitioner had understood their discussions, Petitioner had been able to fully assist in his defense, and it was Petitioner’s decision to accept the plea. (App. 11-12). Judge Dennis explained to Petitioner the constitutional rights he waived by pleading guilty, including the rights to: remain silent, challenges the State’s evidence, and present a defense. (App. 14-15). Petitioner informed the court he understood both the charges and affirmed for the court Counsel had explained the charges to him (App. 4). Petitioner further indicated he was satisfied with the services provided to him by Counsel. (App. 8-9).

Judge Dennis further informed Petitioner that the possession with intent to distribute heroin and cocaine are classified as most serious crimes, meaning Petitioner would have to serve a minimum of eighty-five percent of the sentences imposed. (App. 5-6). Petitioner affirmed he understood and wished to proceed forward. (App. 5-6). Petitioner advised the court he had not been threatened, pressured, intimidated, or promised anything in exchange for his guilty plea. (App. 10, 15). When questioned whether he had been truthful with the court in his answering of the Court's questions, Petitioner affirmed he had. (App. 16).

Furthermore, Petitioner agreed with the facts of the case that were presented at the plea hearing. Notably, he agreed there was additional evidence of Petitioner's guilty, including a jail call admitting guilt where he indicated that he faked a seizure in the back of the patrol car and admitting he had a large amount of cocaine in his mouth at that time, admitting a scale was found in his vehicle and 174 dollars were found on his person. (App. 15).

At the evidentiary hearing Petitioner testified that prior to his plea hearing he saw the SLED report that stated an insufficient quantity regarding the cocaine. (App. 54). He testified that he told his trial counsel "Hey, ain't no cocaine. Can we get the charge dropped so I can get me a better bond." (App. 53). He testified that he brought it up multiple times to trial counsel regarding trial strategy and that he wanted to go to trial because of that. (App. 64).

In the order of dismissal, Judge Jennifer B. Mccoy found that "Petitioner had knowledge of this potential evidence prior to his plea, and still represented to the plea court that he was in fact guilty. Additionally, Petitioner stated to the plea court he agreed with the State's recitation of the facts of this case and stated his answers were truthful." (App. 156). Judge Mccoy further ruled that the plea transcript reflected that Petitioner understood the proceedings, interacted intelligently with the plea court and entered his guilty plea knowingly and voluntarily. (App. 156).

Additionally, Judge McCoy found that Counsel for Petitioner was not deficient because she “credibly testified at the evidentiary hearing she met often with Petitioner in preparation for his trial, discussed discovery with Petitioner, and discussed Petitioner’s constitutional rights with him.” (App. 157). Even though counsel for Petitioner testified at the PCR hearing that she felt she may have been ineffective, her opinion regarding her own effectiveness is not probative of whether she was constitutionally ineffective under *Strickland*. See *Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999). Judge McCoy found that counsel for Petitioner was not deficient under the Strickland standard, because she acted reasonably by counseling Petitioner, discussing potential defenses, appearing on his behalf, arguing pretrial motions, and creating a defense that would have reduced Petitioner’s potential federal exposure.

Furthermore, the PCR court held that Petitioner was not prejudiced by Counsel’s representation. This record does not establish his claim that without counsel’s erroneous advice he would not have pled guilty. Petitioner testified at the evidentiary hearing that he asked Counsel to negotiate dropping his gun charge and the charge for possession with intent to distribute cocaine and that he was willing to plea. (App. 65). Further, he testified that he told Judge Dennis that he wanted to get this matter over with. (App. 76-77). Also in exchange for Petitioner’s guilty plea, the State dropped a gun charge that would have caused severe implications under Petitioner’s federal supervision. In addition, because the possession with intent to distribute charges at issue were third offenses, Petitioner could have faced up to forty-one years for the distribution charges, obstruction of justice, and resisting arrest if sentenced consecutively, but was sentenced to fifteen years on each of the distribution to run concurrently. Additionally, the state presented evidence at the plea hearing to support a conviction of possession with intent to distribute cocaine, which Petitioner pled guilty to. (App. 15).

Considering the totality of the record pertaining to the plea hearing as well as the PCR hearing, it appears that Petitioner understood the charges against him, the consequences he could face, and the strength of the evidence against him. On this record, Petitioner cannot succeed in demonstrating that he pled guilty in an unknowing, involuntary manner, or that but-for deficient advice by counsel, he would have insisted on proceeding to trial. See Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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