

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Oct 07 2024

CERTIORARI TO FLORENCE COUNTY

D. Craig Brown, Plea Judge
George M. McFaddin, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2023-001299

LARENZOE TYSHAWN EPPS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General
S.C. Bar No. 73999

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT.....4

The PCR court properly found Petitioner did not prove counsel was ineffective when (1) probative evidence supports the PCR court’s finding that counsel’s advice and investigation was reasonable under prevailing professional norms and not deficient, and (2) Petitioner did not establish at the PCR hearing an alternate defense strategy that counsel could have investigated and presented that reasonably would have caused Petitioner to go to trial rather than plead guilty.

CONCLUSION.....8

QUESTION PRESENTED

Petitioner's Question

Whether the PCR court erred in finding counsel provided constitutionally effective assistance where counsel failed to adequately consult with Petitioner, failed to discuss the concept of mere presence with Petitioner, and failed to investigate Petitioner's co-defendant who had a long criminal history involving narcotics prior to advising Petitioner to enter a guilty plea which rendered his plea unknowing and involuntary?

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner did not prove counsel was ineffective when (1) probative evidence supports the PCR court's finding that counsel's advice and investigation was reasonable under prevailing professional norms and not deficient, and (2) Petitioner did not establish at the PCR hearing an alternate defense strategy that counsel could have investigated and presented that reasonably would have caused Petitioner to go to trial rather than plead guilty?

STATEMENT OF THE CASE

Procedural History

Petitioner is confined in the South Carolina Department of Corrections serving a fourteen-year-sentence. In June 2016, the Florence County Grand Jury indicted Petitioner for trafficking heroin, twenty-eight grams or more; trafficking cocaine base, ten to twenty-eight grams; trafficking cocaine, ten to twenty-eight grams; possession of a stolen pistol; and possession of a stolen vehicle (2016-GS-21-0804).

On December 4, 2017, Petitioner pled guilty before the Honorable D. Craig Brown to the lesser-included offense of trafficking heroin, four to fourteen grams.¹ Petitioner was represented by Scott P. Floyd, Esquire. Deputy Solicitor John C. Jepertinger represented the State. Petitioner entered his plea pursuant to a negotiated sentence of fourteen years' imprisonment; in exchange for the plea, the State dropped the remaining charges. Judge Brown accepted Petitioner's plea and sentenced him as negotiated. Petitioner did not appeal.

On November 28, 2018, Petitioner filed this current application for post-conviction relief (PCR). On December 12, 2022, an evidentiary hearing convened before the Honorable George M. McFaddin, Jr. Petitioner was present and represented by Joshua A. Bailey, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. On June 11, 2023, Judge McFaddin issued an order dismissing the PCR application and denying relief.

¹ Petitioner pled guilty after a jury was selected for his case.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR 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).

ARGUMENT

The PCR court properly found Petitioner did not prove counsel was ineffective when (1) probative evidence supports the PCR court's finding that counsel's advice and investigation was reasonable under prevailing professional norms and not deficient, and (2) Petitioner did not establish at the PCR hearing an alternate defense strategy that counsel could have investigated and presented that reasonably would have caused Petitioner to go to trial rather than plead guilty.

Petitioner asserts trial counsel was ineffective for failing to adequately consult with Petitioner, discuss the concept of mere presence with Petitioner, and investigate Petitioner's co-defendant, who had a long criminal history involving narcotics prior to advising Petitioner to enter a guilty plea. He contends counsel's deficiency rendered his plea unknowing and involuntary. However, probative evidence supports the PCR court's finding that counsel adequately advised Petitioner of the evidence and his defense strategy of arguing the hotel room where the drugs were found was not registered in Petitioner's name, and the PCR court properly concluded Petitioner did not prove deficiency. Further, Petitioner did not establish an alternate defense strategy counsel would have uncovered upon further investigation and thus did not show a reasonable likelihood he would have proceeded to trial but for counsel's alleged deficiency.

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

“A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial.” Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985). “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.” Dalton, 376 S.C. at 138, 654 S.E.2d at 874.

Here, probative evidence supports the PCR court’s finding that counsel’s advice and investigation was reasonable under prevailing professional norms and not deficient. The PCR court found NOT credible Petitioner’s testimony that plea counsel did not review the fingerprint evidence with him or tell him the hotel receipt was in someone else’s name. (App. 101). In contrast, the PCR court found credible counsel’s testimony that he reviewed the discovery with Petitioner, discussed with Petitioner the person who rented the room (which Petitioner identified by a street name), explained to Petitioner the difference between constructive and actual possession, and would have requested a mere presence charge had this case proceeded to trial. (App. 101-02). These PCR court’s findings are supported by probative evidence, and this Court should defer to the PCR court’s credibility findings. (App. 84, 86-87, 89-91, 93). See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (providing appellate courts “defer to the PCR court's credibility findings as to witnesses who testified before the PCR court”). To the extent Petitioner avers counsel did not

specifically explain the mere presence defense with him, counsel testified he discussed with Petitioner the argument he would make to the jury:

I remember talking to him about the things that we had to argue to the jury, such as the room not being his, you know, the lack of fingerprints, which doesn't in and of itself prove, you know, that—that he didn't exercise control over drugs. That's—that's a question of fact, but it indicates that he didn't leave any fingerprints on them. And so we'd have to argue those things in his—you know, in his favor, and I think I discussed fully what I was going to argue, yes.

(App. 93). Based on the credibility findings, the PCR court properly found counsel's communication with Petitioner about his defense strategy, his preparation of a defense, and his investigation was reasonable under prevailing professional norms and not deficient.

Further, probative evidence supports the PCR court's finding that Petitioner did not prove prejudice. Petitioner himself testified he pled guilty due counsel consulting a lawbook during the hearing, the jury composition,² and counsel's advice to him that he did not have a defense. (App. 69). However, Petitioner did not set forth credible evidence at the PCR hearing of what an additional investigation would have uncovered or what defense counsel should have apprised him of that would have caused him to proceed to trial. Petitioner's primary contention at the PCR hearing revolved around the fact the room was rented in Herbert Wilson's name and the fact Petitioner's fingerprints were not found on it items tested in the room—something counsel credibly explained he was aware of and he discussed with Petitioner. (App. 93). Although Petitioner now avers that counsel could have “further researched [Wilson's] background, talked with individuals who knew Wilson, and investigated why he rented the room at the Palmetto Inn,” (Pet. 8),

² Plea counsel stated he did not have any concerns with the jury's composition. (App. 87).

Petitioner did not produce any evidence at the PCR hearing of Wilson's background³ or why Wilson rented the room, and Petitioner did not call any witnesses who knew Wilson at the PCR hearing. In short, Petitioner did not establish an alternate defense that counsel could have investigated and presented that reasonably would have caused Petitioner to go to trial rather than plead guilty. Thus, probative evidence supports the PCR courts' finding that Petitioner did not prove prejudice.

³ PCR counsel's questioning of whether plea counsel was aware Wilson had pled guilty on November does not constitute evidence here where plea counsel stated he did not recall. (App. 91-92). C.f. S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence.").

CONCLUSION

Based on the foregoing, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON, 73999
Assistant Attorney General



Danielle Dixon
Assistant Attorney General

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
803-734-3737
DanielleDixon@scag.gov

This 7th day of October, 2024