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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable G. Thomas Cooper, Jr.,
Circuit Court Judge

Opinion No. 6087
(S.C. Ct. App. filed Sept. 4, 2024)

APPELLATE CASE NO. 2024-001981

FRANCISCO R. RODRIGUEZ,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

PETITIONER'S STATEMENT OF THE QUESTION

Did the Court of Appeals err in affirming the PCR judge's finding that Petitioner suffered no prejudice 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 THE QUESTION

Whether the Court of Appeals correctly affirmed the PCR court's ruling that Petitioner failed to prove prejudice by failing to prove there's a reasonable probability that he would have insisted on going to trial but for Counsel's deficient advice regarding the immigration consequences of pleading guilty where the record reflects the determinative factor in Petitioner's decision to plead guilty was a more lenient sentence, not his immigration consequences.

STATEMENT OF THE CASE

In July 2015, the Spartanburg County Grand Jury indicted Francisco R. Rodriguez ("Petitioner") for criminal sexual conduct with a minor – first degree ("CSC minor 1st") (2015-GS-42-3396) and criminal sexual conduct with a minor – third degree ("CSC minor 3rd") (2015-GS-423397). On April 12, 2016, Petitioner pled guilty under *Alford*[1] before the Honorable R. Keith Kelly to CSC minor 3rd. In exchange for his plea, the State dismissed the charge for CSC minor 1st. An interpreter was present and translated the proceedings. Joseph R. Baldwin, Esq., ("Counsel") represented Petitioner, and Assistant Solicitor Lindsey H. Overby prosecuted the case. Judge Kelly sentenced Petitioner to fifteen (15) years for CSC minor 3rd and ordered that Petitioner register as a sex offender. Petitioner did not appeal the sentence or conviction.

On November 21, 2016, Petitioner filed an application for post-conviction relief ("PCR"), alleging ineffective assistance of counsel. On July 3, 2017, the State filed a return. On October 10, 2019, an evidentiary hearing convened before the Honorable G. Thomas Cooper, Jr. Lydia A. Hernandez, Esq., represented Petitioner, and the State was represented by Jacob A. Isenberg, Esq. On May 11, 2020, Judge Cooper denied and dismissed the application. On June 16, 2020, Petitioner filed a notice of appeal. On December 3, 2020, Petitioner filed a Petition for Writ of Certiorari. On April 19, 2021, Respondent filed a Return to Petition for Writ of Certiorari. On May 12, 2021, the PCR appeal was transferred to the South Carolina Court of Appeals.[2] On August 22, 2022, the Court of Appeals granted the petition. On May 8, 2024, a three (3) judge panel of the Court of Appeals heard oral argument. On September 4, 2024, the Court of Appeals affirmed the PCR court's ruling, determining Petitioner failed to prove he was prejudiced by Counsel's deficiency. *Rodriguez v. State*, 444 S.C. 431, 907 S.E.2d 153 (Ct. App. 2024), *reh'g denied.*

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).
[2] Pursuant to Rule 243(1), SCACR.

STATEMENT OF THE FACTS

In April 2016, Petitioner pled guilty under *Alford* to CSC minor 3rd, a charge arising from a disclosure by a minor victim to law enforcement that Petitioner had sexually abused her on numerous occasions. An interpreter translated the proceedings.[3] In the PCR hearing, Counsel testified that he told Petitioner that "immigration was probably gonna come and get him when his sentence was over no matter when it ended... and that they would use this conviction against him as a reason to deport him." (App. 43-44). Counsel acknowledged that the plea would completely bar Petitioner from ever legally entering the United States, but when asked whether he explained the immigration consequences to Petitioner, Counsel testified "Yes, I'm sure I did. I told him that it would be used against him in a deportation proceeding if there was one." (App. 43-44). Counsel testified that he explained to Petitioner what an *Alford* plea was a day or two (2) before the plea hearing, and Petitioner was engaged and discussing the sentences others with similar offenses received. (App. 46). Counsel testified that Petitioner told him that he did not want a trial because he did not want to risk the possibility of receiving a twenty-five (25) year sentence. (App. 46). Counsel testified that although Petitioner asked numerous questions during the plea hearing, Petitioner never indicated that he wanted a trial. (App. 46).

Petitioner's testimony at the PCR hearing was primarily based on allegations of deficient performance by Counsel and only secondarily concerned with his immigration consequences. (App. 46). When asked at the PCR hearing what relief he was seeking, Petitioner testified that he sought "[a] new trial or a reduction of the time." (App. 46). None of the interruptions during Petitioner's plea hearing concerned questions about his immigration consequences. (App. 46).

[3] Petitioner is from Mexico and speaks only Spanish.

Petitioner never testified that if Counsel told him deportation was mandatory in his case that he would have proceeded to trial. (App. 46).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight.". *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

REASON WHY CERTIORARI SHOULD BE DENIED

This Court should deny the Petition for Writ of Certiorari because Petitioner's claim that he would have rejected the plea offer but for Counsel's erroneous advice on immigration consequences is merely a *post hoc* assertion as the record reflects the determinative factor in Petitioner's decision to plead guilty was a more lenient sentence, not his immigration consequences.

ARGUMENT

The Court of Appeals correctly affirmed the PCR court's ruling that Petitioner failed to prove prejudice by failing to prove there's a reasonable probability that he would have insisted on going to trial but for Counsel's deficient advice regarding the immigration consequences of pleading guilty where the record reflects the determinative factor in Petitioner's decision to plead guilty was a more lenient sentence, not his immigration consequences.

The PCR court and the Court of Appeals correctly found that Petitioner failed to prove he was prejudiced by failing to show a reasonable probability that he would have insisted on going to trial but for Counsel's deficient advice regarding his immigration consequences where the record reflects the determinative factor in Petitioner's decision to plead guilty was a more lenient sentence, not his immigration consequences. To obtain relief, a PCR applicant who pleads guilty on the advice of counsel must show that (1) counsel's performance was deficient; and (2) there is a reasonable probability that but for counsel's errors, *the applicant would not have plead guilty but would have insisted on going to trial* (i.e. prejudice). *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (emphasis added); *Dalton v. State*, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). A court need not first determine whether counsel's performance was deficient before examining prejudice; "[i]f 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. at 670.

To determine whether there is a reasonable likelihood that the applicant would have gone to trial but for Counsel's advice, the courts must focus on the applicant's decision-making and ascertain the determinative factor in the applicant's decision to plead guilty. *See Lee v. United States*, 582 U.S. 357 (2017) (stating "the *Hill v. Lockhart* inquiry focuses on a defendant's decision-making"); *See Taylor v. State*, 422 S.C. 222, 233, 810 S.E.2d 862, 867 (2018) (stating "by focusing on Petitioner's decision-making, it is uncontested that he 'would have rejected any plea leading to deportation'"). The applicant must show that his decision to plead guilty was based

on the deficient advice by counsel. *See Lee*, U.S. at 361. "Courts 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." *Lee*, 582 U.S. at 358.

In *Lee*, the United States Supreme Court determined that a defendant was prejudiced by his attorney's erroneous advice regarding his immigration consequences where the defendant adequately demonstrated with "substantial and unconverted evidence" that he would have rejected the plea offer if he had known that it would lead to mandatory deportation. *Id.* at 369-71. The defendant, a noncitizen with strong ties to the United States, *repeatedly* asked his attorney whether he would face deportation as a result of the criminal proceedings. *Id.* at 361 (emphasis added). The attorney erroneously told the defendant that he would not be deported as a result of pleading guilty. *Id.* "*Based on that insurance*, [the defendant] accepted the plea." *Id.* (emphasis added). In a PCR hearing, both the defendant and the attorney testified that deportation was the "determinative issue" in the defendant's decision whether to accept the plea. *Id.* at 362. Based on the testimony in the record, the Court stated that there was "no question that avoiding deportation was *the* determinative factor" in defendant's decision whether to plead guilty and there was no reason to doubt the paramount importance the defendant placed on avoiding deportation. *Id.* at 369-70. The Court determined the defendant proved he was prejudiced by showing that his attorney's deficient advice by demonstrating a reasonable probability that he would have rejected the plea offer in favor of trial. *Id.* at 371.

Similarly, in *Taylor*, the South Carolina Supreme Court determined that a defendant was prejudiced by his attorney's erroneous advice regarding his immigration consequences where the defendant show that he would have rejected any plea offer leading to deportation – even if it meant

a more lenient sentence by shaving off prison time. *Taylor*, 422 S.C. at 222-23, 810 S.E.2d at 867. The defendant, a noncitizen, *repeatedly* asked his attorney about the risk of deportation. *Id.* (emphasis added). The defendant insisted that he would have gambled on going to trial, despite the having no viable defense and risking more jail time, if it meant a small chance that an acquittal would let him remain in the United States. *Id.* Based on the testimony in the record, the Court determined that the "determinative factor" in the defendant's decision to plead guilty was avoiding deportation. *Id.* at 233, 810 S.C. at 867. The Court determined that the defendant proved he was prejudiced by his attorney's deficient advice because it was "uncontested that he 'would have rejected any plea leading to deportation.'" *Id.* (citing to and comparing the defendant to the defendant in *Lee v. United States*).

Petitioner failed to prove that he would have rejected the plea offer and would have insisted on going to trial but for Counsel's advice because the determinative factor in Petitioner's decision to plead guilty was the possibility of a more lenient sentence and not his immigration consequences. The evidence presented through the testimony of Counsel and Petitioner supports a finding that Petitioner was primarily concerned about the sentence he would receive and not whether pleading would affect his immigration status. Counsel testified that leading up to the plea hearing, Petitioner engaged in discussions with Counsel in which Petitioner repeatedly inquired about the sentence he would receive if he pled guilty rather than proceed to trial. Counsel testified that Petitioner never indicated that he wanted to go to trial, and Petitioner did not want a trial because he did not want to risk the possibility of receiving a twenty-five (25) year sentence. When asked at the plea hearing if he wanted a trial, Petitioner responded, "No. I want an *Alford*." Counsel testified that during discussions, Petitioner asked about the sentences that other defendants facing the same charges received. Unlike the defendants in *Lee* and *Taylor*, Petitioner did not mention or

repeatedly ask about how a guilty plea would affect his immigration status; instead, Petitioner repeatedly asked about sentencing. Petitioner's original PCR application does not plead an allegation of ineffective assistance of counsel for failure to correctly advise him of his immigration consequences. Additionally, when asked what relief he sought, Petitioner testified that that he was seeking either a new trial or "a reduction in time."

Focusing on Petitioner's decision-making at the time he decided to plead guilty, the evidence in the record establishes that the determinative factor in Petitioner's decision to plead guilty was not his immigration consequences, unlike the defendants in *Lee* and *Taylor*. This fact is acknowledged by the Court of Appeals as follows:

> Despite knowledge of the possibility of immigration consequences, Petitioner's testimony at the PCR hearing was primarily based on his other allegations of deficient performance by his plea counsel and only secondarily concerned with immigration consequences.

Rodriguez, 444 S.C. at 437, 907 S.E.2d at 156. The evidence in the record supports a determination that Petitioner's claim that he would have rejected the plea offer but for Counsel's deficiency is merely a *post hoc* assertion, which this Court should not entertain. *Lee*, 582 U.S. at 369 ("Courts 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. Judges should instead look to the contemporaneous evidence to substantiate a defendant's expressed preferences.").

Petitioner argues that an alleged language barrier between him and Counsel prevented Petitioner from understanding his conversations with Counsel and understanding the consequences of the plea. However, this is refuted by the record. Counsel testified that he and Petitioner spoke in Spanish during discussions, and Petitioner never told Counsel that he did not understand Counsel's Spanish. Counsel testified that he and Petitioner discussed the evidence against Petitioner, the strengths and weaknesses of the case, and possible sentences. Counsel testified that

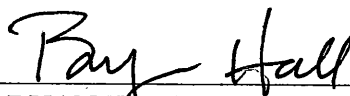
Petitioner was engaged in the discussions and repeatedly asked questions about sentencing. Additionally, any misunderstandings in what Counsel explained was remedied by the fact that an interpreter who was fluent in Spanish translated the plea colloquy between Petitioner and the plea judge. *See Moore v. State*, 399 S.C. 641, 732 S.E.2d 871 (2012) (stating a defendant's waiver of a constitutional right must be established by a complete record and may be accomplished by a colloquoy between the court and the defendant, the court and the defendant's counsel, or both). As noted by the Court of Appeals, *none* of the interruptions that occurred during the plea hearing were due to Petitioner's questions about his immigration consequences. *Rodriguez*, 444 S.C. at 437, 907 S.E.2d at 156 ("None of the interruptions concerned immigration consequences").

It is uncontested that Counsel's advice to Petitioner regarding immigration consequences was deficient. However, Petitioner failed to prove that he was prejudiced by failing to prove a reasonable probability that he would have rejected the plea offer and proceeded to trial but for Counsel's advice. Thus, this Court should deny the petition for a writ of certiorari.

CONCLUSION

Based on the foregoing argument, the Court of Appeals and PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests this Court to affirm the Court of Appeals and PCR courts' rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,



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