STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

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Appellate Case No. 2013-002297

Tobias Aaron Jones, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the PCR judge err in finding Respondent met his burden of proving plea counsel's representation was deficient?

2. Did the PCR judge err in finding Respondent met his burden of proving his guilty plea was involuntary?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent at the April 2009 term for trafficking cocaine, 400 or more grams (2009-GS-23-3198A). (App.pp.61-62). Richard Breibart, Esquire represented Respondent.

On March 4, 2010, Respondent pled guilty. The Honorable Edward W. Miller sentenced Respondent to ten years imprisonment. (App.p.60). Respondent did not file an appeal.

Respondent filed an application for post-conviction relief (PCR) on December 3, 2010 (2010-CP-23-9887). (App.pp.21-25). A hearing was convened at the Greenville County Courthouse on August 28, 2013. (App.pp.31-52). Respondent was present and represented by Beattie B. Ashmore, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable Robin B. Stilwell granted relief in an order filed September 24, 2013. (App.pp.54-59).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge erred in finding Respondent met his burden of proving plea counsel's performance was deficient.

The PCR judge erred in finding Respondent met his burden of proving plea counsel was ineffective. Specifically, the PCR judge found counsel was deficient in the following areas: (1) plea counsel misadvised Respondent about the suppression motion, (2) plea counsel misadvised Respondent that he would only serve five years of a ten-year sentence, (3) plea counsel misadvised Respondent about cooperating with federal officials, and (4) plea counsel did not allow Respondent or his parents to speak at the guilty plea hearing. (App.pp.56-57).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

A.

At the PCR hearing, Respondent stated his charge was dismissed at the

preliminary hearing. (App.p.37). Respondent stated plea counsel said that he would file a suppression motion. (App.p.37). Respondent stated plea counsel later told him the motion had been denied. (App.p.38). Respondent stated he later learned a suppression motion had not been filed. (App.pp.38-39).

The PCR judge erred in finding Respondent met his burden of proving plea counsel misadvised him about the suppression motion and that this prejudiced his case. Even assuming arguendo that plea counsel misadvised Respondent that he had filed a suppression motion, Respondent has failed to present any evidence that such a motion would have been meritorious or successful. In fact, Respondent presented no evidence regarding what the basis for the suppression motion would have been. The mere fact that the case was originally dismissed at the preliminary hearing does not indicate the State had a weak case against Respondent. Respondent has failed to articulate the grounds for a successful suppression motion in his case and, as such, failed to meet his burden of proving he suffered any prejudice. See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.") (citation omitted).

B.

At the PCR hearing, Respondent stated plea counsel told him that he had information the law was about to be changed so that the 85% rule would no longer be in effect. (App.p.39). Respondent stated plea counsel said he would serve as little as five

and a half years of the ten years recommended by the State. (App.p.39). Respondent admitted, however, that plea counsel did not promise he would not serve 85% of his sentence. (App.p.47).

The PCR judge erred in finding Respondent met his burden of proving plea counsel misadvised him about the length of the sentence he would serve if he pled guilty under the ten-year recommendation. The guilty plea transcript refutes Respondent's allegation that he was pleading guilty, in part, because he did not believe he would have to serve his entire sentence. (App.p.47). The plea judge asked Respondent if he had been made any promises in exchange for his guilty plea hearing and Respondent stated he had not. (App.p.7). The assistant solicitor told the plea judge the State was recommending a ten-year sentence. (App.p.11). The guilty plea transcript repudiates the idea that plea counsel promised or led Respondent to believe he would serve a lesser sentence if he, in turn, pled guilty. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007). Even assuming arguendo that plea counsel somehow misadvised Respondent, the guilty plea transcript cures any potential error, as Respondent was advised of the sentence range for the charge and the State's recommendation and he averred he had been made no promises in exchange for his decision to plead guilty. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011).

C.

At the PCR hearing, Respondent stated plea counsel told him not to cooperate with law enforcement officials because the Solicitor was under a federal investigation and would not have any dealings with them. (App.p.40). Respondent stated he had a contact

and could have cooperated but plea counsel told him not to do so. (App.pp.40-41).

The PCR judge erred in finding Respondent met his burden of proving plea counsel misadvised him about cooperating with law enforcement. Even assuming arguendo that plea counsel advised Respondent not to cooperate with federal law enforcement, he has failed to demonstrate that such cooperation would have changed the outcome of his case or resulted in a better sentence. Respondent did not articulate at the PCR hearing what information was of such high value that federal law enforcement would have required his assistance. Respondent also failed to produce any witnesses (such as federal law enforcement officials) at the PCR hearing to testify either that they would have welcomed Respondent's assistance or that any such assistance would have merited that individual contacting the assistant solicitor and requesting a more advantageous plea offer for Respondent. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original).

D.

At the PCR hearing, Respondent stated plea counsel told him not to make any statements during the plea hearing. (App.p.42). Respondent stated plea counsel also said his parents could not speak at the plea hearing. (App.pp.43-44).

The PCR judge erred in finding Respondent met his burden of proving plea counsel misadvised him about whether he or his parents could speak at the plea hearing.

Initially, it should be noted that Respondent was given the opportunity to address the plea judge and chose not to do so. (App.p.12). Regardless, Respondent did not articulate what it was that he wanted to tell the plea judge during the guilty plea hearing. Further, Respondent's parents did not testify at the PCR hearing to explain what they would have said during the plea hearing. Without any testimony about this potential testimony, it is pure speculation that Respondent or his parents addressing the plea judge would have changed the outcome of the hearing. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809.

E.

Accordingly, Respondent failed to prove both prongs of the Strickland test on each of the four instances of alleged ineffectiveness. As Respondent failed to meet his burden of proving ineffective assistance of plea counsel, the PCR judge erred in granting his application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence."). There is no probative evidence to support the PCR judge's finding. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

II. The PCR judge erred in finding Respondent met his burden of proving his guilty plea was involuntary.

The PCR judge erred in finding Respondent met his burden of proving that his guilty plea to trafficking cocaine was not knowingly and voluntarily entered.

A.

At the guilty plea hearing, Respondent indicated he was not under the influence of

any drugs, alcohol, or medication and that he wanted to plead guilty. (App.p.4; p.6). The plea judge read the indictment and noted the sentence range for the offense. (App.p.5). Respondent stated he had not been forced, coerced, threatened, or promised anything in exchange for his guilty plea. (App.p.7). The plea judge described the various rights associated with a trial that would be waived if Respondent pled guilty, and Respondent indicated he understood those rights and wanted to enter a guilty plea. (App.pp.7-8). Respondent stated he was guilty. (App.p.9). Respondent stated he was satisfied with plea counsel's representation and had enough time to review the evidence against him. (App.pp.9-10). After the assistant solicitor recited the underlying facts of the case – that a drug dog alerted on Respondent's car after he was stopped for speeding and the police subsequently found 490.84 grams of cocaine in his vehicle – Respondent agreed these facts were true. (App.pp.10-11).

B.

At the PCR hearing, Respondent stated he had four meetings with plea counsel and did not review the evidence against him. (App.p.37; p.46). Respondent stated he was aware he was facing a sentence between seven and twenty-five years. (App.p.44). Respondent stated he was aware the State made a ten-year recommendation. (App.pp.39-40; p.49). Respondent stated he met with his father and plea counsel and plea counsel stated he was facing a twenty-five year sentence if he did not accept the recommendation. (App.p.39). Respondent stated his father began to cry, so he decided he "just want[ed] this to end right here" and accepted the plea offer. (App.p.39; p.41; p.47). Respondent stated he was satisfied with plea counsel's representation at the time but changed his

mind after "[l]earning things about [plea counsel], learning things about the criminal justice system." (App.pp.47-48).

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent's guilty plea was "not knowing and intelligently made." (App.p.56).

C.

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

D.

The PCR judge erred in finding Respondent's guilty plea was not knowingly and voluntarily entered. As described supra, the plea judge conducted a thorough plea colloquy in this case. Respondent was properly advised of both his constitutional rights and the potential penalty he could receive before he entered – and the judge accepted – his guilty plea. See Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (finding that, before a defendant can enter a guilty plea, he "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived"). Based upon a review of the plea colloquy, it is clear Respondent pled guilty with full knowledge of his actions. There

is no evidence in the guilty plea transcript to support the PCR judge's conclusion that Respondent's guilty plea was not knowing, voluntary, and intelligent. At no point during the guilty plea hearing did Respondent ever waver in his desire to plead guilty. Furthermore, the guilty plea transcript contradicts much of Respondent's PCR testimony. For example, while Respondent stated at the PCR hearing that he had four meetings with plea counsel, he did not object or comment when plea counsel stated at the plea hearing that they had 14-15 meetings. As a further example, while Respondent stated at the PCR hearing that he had not reviewed the State's evidence against him, he told the plea judge that he had enough time to have reviewed the State's evidence. There is a presumption of regularity in final judgments that should prevent challenges to the validity of convictions. See State v. Payne, 332 S.C. 266, 271, 504 S.E.2d 335, 337 (Ct. App. 1998) ("[O]ur case law has a long history of embracing the presumption of regularity that attaches to final judgments."). The guilty plea transcript has refuted Respondent's allegation that his guilty plea was involuntary. See Stalk v. State, 375 S.C. at 300, 652 S.E.2d at 407; see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him).

E.

Accordingly, as Respondent failed to meet his burden of proving his guilty plea was not knowingly, intelligently, and voluntarily entered, the PCR judge erred in granting his application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570

S.E.2d at 174. There is no probative evidence to support the PCR judge's finding. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By: 
ATTORNEYS FOR PETITIONER

March 12, 2014

STATE OF SOUTH CAROLINA
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Tobias Aaron Jones, ...Respondent,

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Beattie B. Ashmore, Esquire
650 East Washington Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served. This 12th day of March, 2014.

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ALAN WILSON
ATTORNEY GENERAL

March 12, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Tobias Aaron Jones v. State of South Carolina**
Appellate Case No: 2013-002297
Lower Court Case No: 2010-CP-23-9887

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Petition for Writ of Certiorari along with the original and one (1) copy of the Appendix in the referenced case.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Beattie B. Ashmore, Esquire
Trisha Allen, Victim Services Counselor