STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No.: 2013-001198

Richard J. Coleman..... Petitioner,

v.

State of South Carolina..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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The PCR court properly found Counsel rendered effective assistance of counsel where Counsel advised Petitioner concerning Fourth Amendment issues, specifically that a suppression motion was most likely going to be unsuccessful because the drug evidence would have been admitted pursuant to the inevitable discovery doctrine, and where it was Petitioner's decision to enter a guilty plea upon competent advice of Counsel 5

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QUESTION PRESENTED

Did the PCR court properly find Counsel rendered effective assistance of counsel where Counsel advised Petitioner concerning Fourth Amendment issues, specifically that a suppression motion was most likely going to be unsuccessful because the drug evidence would have been admitted pursuant to the inevitable discovery doctrine, and where it was Petitioner's decision to enter a guilty plea upon competent advice of Counsel?

STATEMENT OF THE CASE

Richard James Coleman, ("Petitioner"), was indicted at the October 2011 term of the York County Grand Jury for Trafficking Crack Cocaine (2011-GS-46-3300), Possession of Marijuana with Intent to Distribute (PWID) (2011-GS-46-3301), PWID Marijuana within proximity of a public park or playground (2011-GS-46-3302), Trafficking Cocaine (2011-GS-46-3303), PWID Cocaine within proximity of a public park or playground (2011-GS-46-3304), and PWID Crack Cocaine within proximity of a public park or playground (2011-GS-46-3305). Petitioner was represented by Mark McKinnon, Esq. On April 24, 2012, Petitioner pled guilty to Trafficking Crack Cocaine, 2nd offense as a lesser included offense, PWID Marijuana, 3rd of subsequent offense, PWID Marijuana within proximity of a park, Trafficking Cocaine, 2nd offense, PWID Cocaine, and PWID Crack Cocaine as indicted. The Honorable Lee S. Alford sentenced Petitioner, pursuant to a negotiated sentence, to confinement for ten (10) years for each charge to run concurrently. Petitioner did not appeal his conviction or sentence.

Petitioner subsequently filed an application for post-conviction relief (PCR) on September 17, 2012. Petitioner claimed, *inter alia*, ineffective assistance of trial counsel "ill-advis[ing] defendant of motion to suppression hearing; stating that the judge tends to side with officers and solicitors. If that happens then the defendant has no defense." Respondent made its Return on December 6, 2012. On May 16, 2013, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Charles T. Brooks, III, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On May 22, 2013, the Honorable John C. Hayes, III denied and dismissed Petitioner's application with prejudice by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR court properly found Counsel rendered effective assistance of counsel where Counsel advised Petitioner concerning Fourth Amendment issues, specifically that a suppression motion was most likely going to be unsuccessful because the drug evidence would have been admitted pursuant to the inevitable discovery doctrine, and where it was Petitioner's decision to enter a guilty plea upon competent advice of Counsel.

Petitioner asserts the PCR court erred in finding that Counsel rendered effective assistance of counsel where plea counsel "erroneously advised Petitioner to accept the plea offer when a suppression hearing would have resulted in the drug charges being dismissed because the officers exceeded the scope of Petitioner's consent to search a particular bag when the officers then opened a second bag that contained drugs without obtaining Petitioner's consent and thereafter conducted a full search of Petitioner's apartment based on evidence discovered during the illegal search." This argument is without merit.

During the guilty plea, the State explained that officers responded to hang-up call from a female. (App. p. 12). When they responded to a certain apartment and found no female, officers knocked on the apartment door in which Petitioner was located. (App. p. 12). Officers asked whether there was a female inside, and Petitioner responded that his girlfriend was inside the apartment. (App. p. 12). Officers were then allowed inside of the house where they immediately smelled the odor of burnt marijuana and fresh, unburnt marijuana, as well as saw marijuana in plain view. (App. pp. 12-13). Officer then observed a backpack, asked for consent to search, which Petitioner agreed to, and searched the backpack. (App. p. 13). Nothing illegal was found in the first backpack. (App. p. 13). Without consent to search the other backpack, officers opened it and found marijuana. (App. p. 13). Officers then called out for the Drug Enforcement Unit (DEU) to respond to the scene, which it did. (App. p. 13). When the DEU responded, it was

the officer's intention to obtain a search warrant for the apartment, but Petitioner gave his written consent to search the apartment. (App. p. 13). Officers then searched the house and found various packages containing over 1,500 grams of marijuana, 109 grams of crack cocaine and 46 grams of powder cocaine. (App. p. 13).

After the State recited the facts of the case, the plea court asked Petitioner if he disagreed with the facts in any way, to which he responded, "No, sir." (App. p. 15 line 14).

At the PCR hearing, Counsel testified that the inevitable discovered doctrine would conflict with Petitioner's Fourth Amendment rights concerning the search of the second bag. (App. p. 54). Counsel also testified, while the officers searched the second bag without Petitioner's consent where they found a large amount of narcotics, had a suppression hearing occurred, Petitioner's problem would have been that the officers would have testified they would have obtained a search warrant pursuant to what they had already found in the apartment. (App. p. 55). Counsel testified this was the basis of his discussion with Petitioner and had a suppression hearing been unsuccessful, Petitioner would have faced a mandatory minimum of twenty-five years' imprisonment. (App. p. 55). Counsel further testified that he recommended Petitioner accept the State's ten-year offer based on the surrounding circumstances of the case, but that it was Petitioner's decision to accept the State's offer. (App. p. 56-57; 58).

In its Order of Dismissal, the PCR court held:

> [P]lea counsel reasonably explained to [Petitioner] the possible outcomes and defenses should the case go to trial, and the record reflects that [Petitioner] agreed that all of his potential defenses had been explained to him by plea counsel at the time of his plea...The [c]ourt finds that it was the decision of [Petitioner] to enter his plea of guilt upon the advice of competent counsel with which [Petitioner] was satisfied at the time of the plea.
>
> Based on the evidence presented at the PCR hearing, as well as a review of the record, the [c]ourt finds [Petitioner] has not met his burden of proving ineffective assistance of counsel..."

(App. p. 65).

In a PCR action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

The PCR court properly found Counsel rendered effective assistance of counsel where Counsel advised Petitioner concerning Fourth Amendment issues and where it was Petitioner's decision to enter a guilty plea upon competent advice of Counsel. Counsel testified he fully discussed Petitioner's Fourth Amendment rights with Petitioner, but concluded the inevitable discovery doctrine would have conflicted with Petitioner's rights. Counsel also stated he advised Petitioner of the consequences of challenging the narcotics through a pre-trial suppression hearing and advised him concerning the sentence exposure Petitioner was facing if the suppression hearing was unsuccessful. (App. pp. 53-59). During the recitation of facts at the guilty plea, it was stated that officers came to Petitioner's apartment based on a hang-up call from a female located in his apartment complex and they were checking on the female's safety. When asked if the officers could check on Petitioner's girlfriend, Petitioner agreed. At this point, officer smelled and saw marijuana in the apartment. They then search two bags: one with Petitioner's consent and one without. In the second bag they found narcotics. Officers then asked Petitioner's consent to search the apartment, and Petitioner complied. More narcotics were found and Petitioner claimed all of the drugs as his. (App. pp. 12-14). Petitioner, at the plea, did not disagree with the recitation of facts in any way. (App. p. 14). Petitioner also admitted his guilt to these charges. (App. p. 12). See Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977) (Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed.); see also Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975) (Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.).

Here, Officers responded to a hang-up call at Petitioner's apartment complex. When they knocked on an apartment door and found no female, they came to Petitioner's apartment and knocked on the door. Petitioner opened the door and allowed officers to enter his apartment. Immediately upon entering, officers saw and smelled marijuana in plain view. See State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." (citing State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999)). At this point, officers had probable cause to arrest Petitioner. See Georgia v. Randolph, 547 U.S. 103, 118, 126 S. Ct. 1515, 1525 (2006) ("And since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause") (citing Texas v. Brown, 460 U.S. 730, 737-739, 103 S.Ct. 1535 (1983) (plurality opinion)). Upon having probable cause, officers could have pursued obtaining a search warrant for the apartment based on the marijuana evidence. Cf. State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (Ct. App. 2003) ("[E]vidence of a sale of drugs supports an inference that more will be found at the place of operation.") (citing State v. Maffeo, 31 Wash.App. 198, 642 P.2d 404, 406 (1982)). Instead, officers asked Petitioner for consent to search the first bag, which Petitioner obliged. Upon not finding any narcotics, officers searched a second bag, which they did not have consent to search. In this bag, officers found narcotics. However, upon informing Petitioner they were going to seek a search warrant, the DEU obtained Petitioner's written consent to search the entire apartment from Petitioner. See United States v. Delancy, 502 F.3d 1297, 1315 (11th Cir. 2007) (finding a "reasonable probability" existed that the drugs would have been inevitably discovered as a result of

defendant's consent.). There is no evidence in the record that Petitioner limited the scope of the officers' search of his apartment. See Florida v. Jimeno, 500 U.S. 248, 111 S. Ct. 1801 (1991) (When a defendant gives consent to search and his consent is reasonably understood to extend to a particular container, officers are not required to obtain more specific consent to search.). Consequently, the drugs would have inevitably been discovered either through a search warrant and/or through Petitioner's consent. As such, Counsel properly advised Petitioner that a suppression hearing would most likely be unsuccessful, and Petitioner would have been subjected to a mandatory minimum sentence of twenty-five years.

Therefore, the PCR court properly found Counsel rendered effective assistance of counsel where Counsel advised Petitioner concerning Fourth Amendment issues and where it was Petitioner's decision to enter a guilty plea upon competent advice of Counsel. Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
S.C. Bar # 78871

By: _____
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

May 19, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

RICHARD J. COLEMAN, 350680

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani
SC Commission on Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 19th day of May 2014.

CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 19 2014
S.C. Supreme Court

May 19, 2014

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

***RE:* Richard Coleman, 350680 v. State of South Carolina**
2013-001198

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services