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 G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001738

Aaron Winford Collier, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Was the guilty plea rendered involuntary by counsel's failure to advise Petitioner that he was pleading guilty to a no parole offense?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for failure to stop for a blue light (2009-GS-23-1719), driving under suspension (DUS) (2009-GS-23-2703), and reckless driving (2009-GS-23-2704). (App.pp.201-09). C. Carlyle Steele, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On November 9, 2010, the Honorable Robin B. Stilwell sentenced Petitioner to concurrent terms of five years for failure to stop for a blue light, second offense, six months for DUS, third offense or greater, and thirty days for reckless driving. (App.pp.197-98).

On the same date, Petitioner pled guilty[1] to possession with intent to distribute (PWID) methamphetamine, second offense (2009-GS-23-6290) and received a concurrent sentence of fifteen years suspended on service of eight years and five years probation. (App.p.198; pp.210-12). In addition, Petitioner's probation was revoked on the charge of PWID methamphetamine (2005-GS-23-5140) and he received a concurrent eight year sentence. (App.p.198; p.213). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on November 4, 2011 (2011-CP-23-7360). (App.pp.214-21). A hearing was convened at the Greenville County Courthouse on April 17, 2013. (App.pp.227-51). Petitioner was present and represented by Richard H. Warder, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order dated May 14, 2013. (App.pp.252-58).

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[1] App.pp.189-97.

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proof.

Petitioner argues his guilty plea was rendered involuntary because counsel failed to advise that a guilty plea to PWID methamphetamine, second offense would not be parole eligible. This issue is without merit.

A.

At the PCR hearing, Petitioner stated that – after his trial – plea counsel and the assistant solicitor said he could resolve his pending charge. (App.p.243). Petitioner stated plea counsel said he would receive a five year sentence but admitted plea counsel did not promise he would receive five years. (App.pp.243-44; p.247). Petitioner stated plea counsel said this would be a non-violent sentence but did not mention he would serve 85% of that sentence. (App.p.244). Petitioner stated plea counsel never gave him any advice about parole eligibility. (App.p.249). Petitioner stated he would not have pled guilty if he had known the PWID methamphetamine charge was not parole eligible. App.p.245).

Plea counsel testified that, after Petitioner's trial, the State offered to resolve Petitioner's pending charges and probation revocation. (App.p.236). Plea counsel testified Petitioner agreed and was "emphatic" about resolving the charges. (App.p.236). Plea counsel testified he likely did not discuss parole eligibility regarding the guilty plea to the PWID methamphetamine charge but noted Petitioner "was anxious to plea." (App.p.238). Plea counsel testified Petitioner "was real enthusiastic about going forward, both to me personally in an aside and also in the record. He's quite emphatic about, I want to get it behind me." (App.p.239).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner's guilty plea was voluntary. (App.pp.255-56). The PCR judge also found Petitioner failed to meet his burden of proving plea counsel did not properly advise him regarding parole eligibility. (App.pp.256-57).

B.

One 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. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must

establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). Moreover, a criminal defendant entering a guilty plea "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." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). 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 PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citation omitted).

C.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to post-conviction relief. Petitioner did not prove plea counsel was deficient. See Roscoe v. State, 345 S.C. at 20, 546 S.E.2d at 419. After examining the record and weighing the testimony, the PCR judge found and concluded Petitioner entered a knowing and voluntary guilty plea. (App.pp.255-56). The PCR judge determined plea counsel was a credible witness. (App.p.255). Conversely, the PCR judge specifically found Petitioner's testimony that he would not have pled guilty if he had known he would not be parole eligible was not credible. (App.pp.256-57). This

Court must give great deference to the PCR judge's credibility determinations. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Regardless, while Petitioner argues his plea was involuntary because he was not advised about parole eligibility, the PCR judge's findings are supported by Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004). In Randall, our Supreme Court noted it had "repeatedly acknowledged that normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea." Id. at 641, 591 S.E.2d at 609. In the present case, Petitioner asserted he was given no advice whatsoever regarding whether entering a guilty plea to PWID methamphetamine, second offense would alter his eligibility for parole. (App.p.249). As this circumstance is squarely addressed by Randall, the PCR judge did not err in finding his plea was involuntary because plea counsel did not advise him about parole eligibility. (App.p.256).

D.

While Petitioner argues Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010) renders Randall "questionable,"[2] this argument is without merit. In Padilla, the

[2] Cert. Pet., p.6.

United States Supreme Court noted it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'". Id. at 365, 130 S. Ct. at 1481. Padilla, however, is inapplicable in this case. The Padilla court specifically stated the "collateral versus direct distinction is thus ill suited to evaluating a Strickland[3] claim concerning the specific risk of **deportation**." Id. at 366, 130 S. Ct. at 1482 (emphasis added). The Padilla court was concerned that deportation was a severe penalty closely related to the criminal process. See also Chaidez v. United States, ___ U.S. ___, 133 S. Ct. 1103, 1110 (2013) (noting the Padilla court found the situation of deportation is "unique"). The instant case, however, does not concern the issue of deportation. Rather, parole eligibility is a collateral consequence of sentencing and is not viewed as a unique or severe penalty. See Turner v. State, 384 S.C. 451, 455 n.4, 682 S.E.2d 792, 794 n.4 (2009); Randall v. State, 356 S.C. at 641, 591 S.E.2d at 609.

Regardless, as Petitioner failed to demonstrate prejudice, he cannot prevail on his claim for relief. See Taylor v. State, 404 S.C. 350, 361-62, 745 S.E.2d 97, 103 (2013) (holding the failure to prove prejudice was fatal to the defendant's Padilla argument). Plea counsel testified Petitioner was "emphatic" and "enthusiastic" about resolving his pending charges and probation issues after his jury trial. (App.p.236; p.239). Plea counsel's testimony – found to be credible by the PCR judge – is also supported by the record. At no point during the guilty plea hearing does Petitioner state he is pleading guilty only because he wanted to serve 85% of that sentence. Rather, the transcript

[3] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

reflects Petitioner thanked the plea judge for resolving all of his outstanding matters at that time and stated he would "rather get it all over with now." (App.p.187). Based upon the substantial benefit he received in resolving his pending charges and probation matters, the guilty plea transcript, and Petitioner's testimony at the PCR hearing, the PCR judge found Petitioner's testimony at the PCR hearing was not credible. (App.pp.256-57). See Drayton v. Evatt, 312 S.C. at 13, 430 S.E.2d at 522. Petitioner failed to demonstrate he would have gone to trial on the PWID methamphetamine, second offense charge if he had known that the sentence would not be parole eligible.

E.

Accordingly, as Petitioner failed to meet his burden of proving that he was entitled to post-conviction relief, the PCR judge did not err in denying the PCR application. 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.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

June 10, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001738

Aaron Winford Collier, ... Petitioner,

v.

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CERTIFICATE OF SERVICE

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

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 10th day of June, 2014.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

June 10, 2014

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

Re: Aaron Winford Collier v. State of South Carolina
Appellate Case No: 2013-001738
Lower Court Case No: 2011-CP-23-7360

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

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

KCR/jacc
Enclosures

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services Counselor