

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

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The Honorable William H. Seals Jr., Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014-000068

Anthony Tommy Wilson, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the post-conviction relief judge properly find plea counsel was not ineffective in not filing a motion to suppress Petitioner's statement where Petitioner knowingly and voluntarily waived his right to challenge the statement when he pled guilty?

STATEMENT OF THE CASE

In June 2009, the Florence County Grand Jury indicted Applicant for murder, first degree burglary, and armed robbery. (App. pp. 91-93). Everett G. Ballenger, Esquire (“plea counsel”), represented Petitioner. (App. p. 1). On March 12, 2012, Applicant entered a negotiated plea to murder and first degree burglary. (App. p. 3, lines 9-10). Applicant pled guilty to the murder charge pursuant to North Carolina v. Alford.¹ (App. p. 3, lines 21-24). The Honorable Thomas A. Russo sentenced Applicant to thirty (30) years for murder and a concurrent thirty (30) years for first degree burglary. (App. pp. 94-95).

Petitioner filed an application for post-conviction relief on August 9, 2012. (App. pp. 27-33). Joshua A. Bailey, Esquire, represented Petitioner. (App. p. 43). Petitioner filed an amended application for post-conviction relief on September 5, 2013. (App. pp. 39-42). The Honorable William H. Seals Jr. (“the post-conviction relief judge”) convened an evidentiary hearing on the application in Marion County on October 9, 2013. (App. p. 43). The post-conviction relief judge denied relief in an order dated November 27, 2013, and filed December 10, 2013. (App. pp. 82-90).

¹ 400 U.S. 25 (1970)

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding plea counsel was not ineffective for not filing a motion to suppress Petitioner's statement.

Petitioner asserts the post-conviction relief judge erred in finding plea counsel did not render ineffective representation when he allowed Petitioner to plead guilty without filing a motion to suppress Petitioner's statement. However, Petitioner's argument ignores the fact significant probative evidence indicates Petitioner was fully advised of the ability to challenge the statement, and waived any potential challenges to it by pleading guilty. Accordingly, the post-conviction relief judge properly determined plea counsel was not ineffective

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this

presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

At the evidentiary hearing, Petitioner admitted he discussed with plea counsel both his statement and a motion to suppress the statement. (App. p. 53, lines 13-18). However, he testified he specifically requested plea counsel file a motion to suppress the statement. (App. p. 53, line 25-p. 54, line 2). He averred he would have insisted upon going to trial if plea counsel had filed a motion to suppress the statement. (App. p. 54, lines 3-8). However, he admitted he did not feel the motion to suppress was important at the time he pled guilty. (App. p. 57, lines 8-13).

In contrast, plea counsel testified² he discussed the statement with Petitioner on several occasions. (App. p. 62, line 17-p. 63, line 17). He testified he challenged the admission of the statement in the Family Court waiver hearing. (App. p. 61, line 11-p. 62, line 3). Plea counsel candidly testified he did not think the circumstances surrounding the statement warranted its suppression. (App. p. 62, lines 9-16). Plea counsel testified Petitioner never indicated his decision to plead or go to trial was conditioned on the filing of the motion to suppress. (App. p. 67, line 22-p. 68, line 16). Instead, Petitioner never even told plea counsel he wanted to proceed to trial. (App. p. 64, lines 13-15). Plea counsel indicated Petitioner signed a plea affidavit where he acknowledged he was waiving the right to challenge the voluntariness of the statement. (App. p. 65, line 14-p. 66, line 5).³ He also indicated there was more evidence of Petitioner's guilt, including the testimony of two (2) co-defendants. (App. p. 60, lines 1-7). Based on his view of the case, plea counsel advised Petitioner a plea was in his best interest, and Petitioner agreed. (App. p. 67, line 24-p. 68, line 16).

In light of the testimony at the guilty plea and the evidentiary hearing, Respondent submits Petitioner knowingly and voluntarily waived his right to challenge the admissibility of his statement. This exact question was answered by this Court in Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). There, the applicants alleged

² The post-conviction relief judge found plea counsel's testimony very credible, and Petitioner's not credible. (App. p. 87). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a post-conviction judge's credibility findings).

³ This plea affidavit was entered as a court's exhibit at the plea hearing. (App. p. 2, line 16). Along with this return, Respondent has filed a motion to supplement the appendix with a copy of this affidavit. If the Court grants the motion, Petitioner would direct the Court's attention to (Supp. App. p. 1-9) for the substance of Petitioner's plea affidavit and (Supp. App. p. 4) for the specific question regarding incrimination statements. Petitioner testified at his guilty plea that he understood everything in the affidavit and that his answers to those questions were true. (App. p. 9, line 17-p. 10, line 8).

their counsels were ineffective for failing to make a motion to suppress evidence. Whetsell, 276 S.C. at 296, 277 S.E.2d at 892. This Court held an applicant cannot raise allegations of ineffective assistance of counsel for failure to make a motion to suppress a statement where the applicant, at the time of the plea, “made an informed judgment as to whether the motion to suppress should be made and the guilty plea entered.” Id. at 299, 277 S.E.2d at 893.

Here, plea counsel and Petitioner discussed the statement and potential challenges to it on numerous occasions. Petitioner was fully aware of the potential risks and benefits of challenging the statement at trial. Although Petitioner’s statement he only understood his rights “a little bit” could have been grounds for a motion to suppress, plea counsel advised him that the statement may not be suppressed at trial.⁴ Furthermore, plea counsel explained to Petitioner there was other evidence of his guilt that would have made success at trial unlikely even without the statement. Petitioner also signed a plea affidavit indicating his desire to waive a potential motion to suppress the statement. Interestingly, Petitioner had the opportunity to witness an unsuccessful motion to suppress the statement at his waiver hearing. In light of the totality of the record, Petitioner made the decision to enter a guilty plea based on a full understanding of the circumstances surrounding his statement.

⁴ In his Petition of Writ of Certiorari, Petitioner devotes significant discussion to the likelihood of success had the statement been challenged at trial. This discussion ignores the fact Petitioner’s plea colloquy indicates he knowingly and voluntarily pled guilty. (App. p. 10, line 14-p. 15, line 14). See Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (“To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991))). Petitioner’s knowing and voluntary plea moots any further discussion of the merits of his suppression argument. However, Respondent submits the post-conviction relief judge properly determined Petitioner failed to demonstrate a likelihood of success had a motion to suppress been filed. (App. pp. 88-89). See State v. Pittman, 373 S.C. 527, 565-70, 647 S.E.2d 144, 164-66 (2007).

The post-conviction relief judge properly gave no credit to Petitioner's present attempt to disavow any understanding of the circumstances surrounding his statement. By pleading guilty with a full understanding of his right to challenge the admissibility of the statement, Petitioner has waived collateral review of this issue. Id. at 297, 277 S.E.2d at 892 ("The general rule is that guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea." (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970))). Furthermore, plea counsel's "informed advice should not be subject now to retrospective examination." Id. at 299, 277 S.E.2d at 893. Instead, the record demonstrates Petitioner plead guilty without challenging the statement in hopes of receiving the benefit of the negotiated sentence. See Bennett v. State, 371 S.C. 198, 204-05, 638 S.E.2d 673, 676 (2006) (counsel not ineffective for advising client to plea to avoid maximum penalty if convicted). Likewise, Petitioner's allegation he only pled guilty because counsel failed to file a motion to suppress is belied by his admission at the plea hearing that he was satisfied with counsel's representation. (App. p. 14, lines 9-19). See Kollé v. State, 386 S.C. 578, 597 n.7, 690 S.E.2d 73, 83 n.7 (2010) (Kittredge, J., dissenting) (an inmate should not be able to collaterally attack a plea where counsel's alleged deficiency was known at the time of the plea and the inmate lied about counsel's performance at the plea). Petitioner's argument he did not understand the statement could have been challenged at trial is without merit.

The record contains significant probative evidence Petitioner fully understood the risks and benefits of proceeding to trial and challenging the admissibility of his statement. These risks and benefits factored into his calculated decision to enter a guilty plea and

waive any right to challenge the evidence against him. Accordingly, the post-conviction relief judge did not err in finding plea counsel was not ineffective in not filing a motion to suppress Petitioner's statement.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

November 24, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

The Honorable William H. Seals, Jr. Circuit Court Judge

ANTHONY TOMMY WILSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Carman V. Ganjehsani
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 24th day of November, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

November 24, 2014

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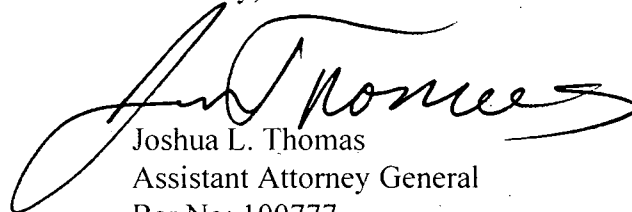
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Anthony Tommy Wilson v. State of South Carolina
Appellate Case No: 2014-000068

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Carmen V. Ganjehsani, Esquire (2 copies)