STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 28 2015
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Guilty Plea Judge
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2015-000785

Edward Rorecuse Young, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

QUESTION PRESENTED

1. Did the PCR judge err in finding Respondent met his burden of proving Counsel was deficient in explaining actual and constructive possession and that he suffered prejudice as a result?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent at the November 2010 term of General Sessions for trafficking cocaine base (2010-GS-23-9215A). (App.pp.156-57). Scott D. Robinson, Esquire ("Counsel") represented Respondent.

On October 9, 2012, the State called the case to trial. Though the matter began as a bench trial, Respondent ultimately pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970). The Honorable William H. Seals, Jr. sentenced Respondent to seven years imprisonment for trafficking cocaine base (10-28 grams), second offense. (App.p.82; p.155). Respondent did not appeal.

Respondent filed an application for post-conviction relief (PCR) on September 27, 2013 (2013-CP-23-5236). (App.pp.85-89). A hearing was held at the Greenville County Courthouse on December 16, 2014. (App.pp.96-148). Respondent was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an order filed March 19, 2015, the Honorable Eugene C. Griffith, Jr. granted post-conviction relief and ordered a new trial. (App.pp.150-54).

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 erred in finding Respondent met his burden of proof under Strickland v. Washington because he demonstrated Counsel failed to properly explain the concepts of actual and constructive possession and that he was prejudiced because he pled guilty on Counsel's advice.

The PCR judge erred in granting post-conviction relief in this case. Respondent failed to satisfy his burden of proving either that Counsel was deficient or that he suffered prejudice as a result of the alleged deficiency.

A.

Prior to the commencement of a bench trial in this case, testimony was taken regarding a suppression motion and a Jackson v. Denno issue. Deputy Mitchell testified he was doing yardwork outside of his residence when he saw Respondent[1] exit a dark Crown Victoria and run "off the road into the woods there." (App.pp.5-6). Deputy Mitchell went towards the woods to look for Respondent, who he said "was bent over at the waist." Deputy Mitchell confronted Respondent when he came out of the woods and back towards the vehicle and that Respondent stated he was using the bathroom. (App.pp.9-11). Deputy Mitchell noted the Crown Victoria's tag number and went to investigate the area of the woods where Respondent had been. (App.pp.12-13). Deputy Mitchell went to "the wood line where [he] last saw [Respondent]" and found a paint can with a pill bottle inside a Ziploc bag. (App.pp.13-14). Based upon his experience, Deputy Mitchell stated the rock-like substance in the pill bottle was crack cocaine. (App.pp.14-15). Deputy Mitchell reported the events to dispatch and a short time later

[1] Deputy Mitchell performed an in-court identification of Respondent. (App.p.12).

received a call that the Crown Victoria had been stopped. (App.pp.15-17). Deputy Mitchell – now wearing a Sheriff's Office vest and displaying a badge – went to that scene and identified Respondent as the person he saw in the woods earlier. (App.pp.18-21). Deputy Mitchell read Respondent his Miranda rights and Respondent said he was paid $50 to retrieve the paint can. (App.pp.22-23).

Mike Moore testified he was a deputy with the Sheriff's Office at the time of this incident. (App.pp.48-49). Moore responded to the scene and took possession of the suspected crack cocaine. (App.pp.49-50). Moore later detained the suspect vehicle and witnessed Deputy Mitchell reading Miranda rights to Respondent. (App.pp.51-55).

Bradley Baxter testified he was a licensed private investigator who tape-recorded the area in the woods where the paint can was found. (App.pp.63-64). This tape was entered into evidence. (App.p.67).

Counsel argued the State had not proven Respondent had dominion and control over the paint can or the drugs. Counsel argued Deputy Mitchell did not see Respondent bending over the paint can and that his mere presence in the area was insufficient. (App.pp.70-73). The judge, as this was a bench trial, left the record open for additional testimony regarding the suppression motion.[2] (App.pp.74-75).

After the matter was reconvened to begin the bench trial, the parties had a bench conference and a brief recess. (App.pp.75-76). When the judge went back on the record, the clerk of court announced Respondent was pleading guilty. (App.p.76). The plea judge advised Respondent of the sentence range for the charge. (App.p.77). The plea

[2] Additionally, the judge found the statement was freely and voluntarily given. (App.p.74).

judge advised Respondent he could continue with the bench trial and explained the rights he would be waiving in pleading guilty. (App.pp.77-79). Respondent stated he was satisfied with Counsel and had not been coerced into pleading guilty. (App.p.79). The assistant solicitor recited the facts and Counsel noted this was an Alford plea. (App.pp.80-81). Respondent did not dispute either the factual basis for his guilty plea or the recitation of his prior convictions. (App.p.82).

B.

At the PCR hearing, Respondent stated he discussed his case with Counsel. (App.p.115). Respondent stated Counsel said the State could not prove actual possession in his case. (App.p.116). Respondent stated Counsel explained constructive possession to him but not actual possession. (App.pp.126-27). Respondent stated Counsel told him there would be a suppression hearing to get one of the two incidents suppressed. (App.pp.116-17). Respondent stated that – after the suppression hearing – Counsel told him that, in light of the statement, he should consider pleading guilty. (App.pp.118-19). Respondent stated Counsel said it would be hard to fight the charge because the drugs were coming in and so he pled guilty on Counsel's advice. (App.pp.119-20). Respondent admitted on cross-examination, however, that he pled guilty just to resolve the matter. (App.p.128).

Counsel testified the goal of the suppression hearing was to "keep the drugs out." (App.pp.100-01). Counsel testified this was a constructive possession case because Respondent "did not have dominion and control over that paint can." (App.p.101). Counsel testified this was the argument he made at the suppression hearing.

(App.pp.103-04). Counsel testified he explained constructive possession to Respondent but that they did not discuss actual possession because "[t]hese drugs were not found on [Respondent]." (App.pp.101-02). Counsel testified that "[i]f the drugs were allowed in, I think it would have been prudent to consider a guilty plea." (App.p.106). Counsel testified that, after the drugs were not suppressed during the bench trial, he had adequate time to discuss with Respondent the options of either proceeding with the bench trial or entering a guilty plea. (App.pp.111-12).

In granting Respondent's application for post-conviction relief, the PCR judge found "plea counsel failed to render reasonably effective assistance under prevailing professional norms by failing to accurately explain actual and constructive possession to [Respondent] and giving erroneous legal advice." The PCR judge also found Respondent "pled guilty after relying on plea counsel's advice" and thus proved he suffered prejudice. (App.p.153).

C.

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).

D.

Deficiency

The PCR judge erred in finding Respondent met his burden of proving Counsel was deficient for "by failing to accurately explain actual and constructive possession to [Respondent] and giving erroneous legal advice." The PCR judge's finding was in error because, based upon the facts of this case, it was not incumbent upon Counsel to discuss the law of actual possession.

The statue for trafficking cocaine base/crack cocaine explicitly states one can be found guilty of the offense based upon a variety of facts:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony.

S.C. Code Ann. § 44-53-375(C)(1) (Supp. 2010) (emphasis added). "Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." State v. Burgess, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (quoting State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)).

Respondent and Counsel both testified Respondent's story was that the drugs were not his. Respondent and Counsel both testified Counsel explained the theory of constructive possession to Respondent and that this was argued at the suppression hearing. Respondent and Counsel both testified Counsel did not explain the theory of actual possession. Based upon the facts of Respondent's case (and Respondent's own version of events), however, there was no reason to either explain or explore the concept of actual possession. The crack cocaine was not found either in the Crown Victoria or on Respondent's person. Rather, Respondent was spotted in the general vicinity of a wooded area where crack cocaine was found in a paint can. Counsel specifically testified his trial strategy was to move to suppress the drugs because Respondent did not have dominion or control over the crack cocaine – and thus was not in constructive possession of it. This was a valid trial strategy that should not have been second-guessed by the PCR judge. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Based upon both the facts of the case and his conversations with Respondent, it was not necessary for Counsel to have discussed the theory of actual possession. This concept was not germane to the case at hand. Further,

Counsel cannot be found deficient for failing to explain actual possession when, based upon the facts before him, he chose to instead argue Respondent was not in constructive possession of the crack cocaine. Counsel need not have discussed this strategic decision with Respondent. See Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 657 (1988) ("The adversary process could not function effectively if every tactical decision required client approval.").

As this case did not center on whether Respondent was in actual possession of the crack cocaine, the PCR judge clearly erred in finding Counsel deficient because he did not explain this concept to Respondent. Counsel made the strategic decision to argue at the suppression hearing that Respondent was not in constructive possession of the crack cocaine. The PCR judge also erred in finding Counsel gave "erroneous legal advice." Respondent failed to demonstrate either that Counsel gave erroneous advice or that he relied upon said advice. See Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001) (holding a PCR applicant must show his attorney's performance "fell below an objective standard of reasonableness"). As such, Respondent did not meet his burden of proving Counsel's representation was deficient. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Prejudice

The PCR judge erred in finding Respondent met his burden of proving he suffered prejudice because he "pled guilty after relying on [C]ounsel's advice." The PCR judge's finding was in error because Respondent did not base his decision to plead guilty solely upon his conversations with Counsel.

On direct examination at the PCR hearing, Respondent stated he pled guilty after the suppression hearing based upon Counsel's advice. Specifically, he stated Counsel said that, as his statement had been found voluntary, he "should consider taking the plea." (App.p.119). Respondent stated he pled guilty because Counsel "was saying that like I was going to lose. And I didn't want to lose." (App.p.119). Respondent contradicted himself later during his direct examination when his attorney asked "[i]f the drugs weren't suppressed and if your statements, for example, were allowed in, would you have wanted to proceed to trial?" and he responded "[y]es, I would." (App.p.124). This was exactly the scenario in place when Respondent chose to abandon the bench trial and plead guilty.

Furthermore, on cross-examination Respondent admitted he pled guilty just to resolve the matter. Respondent stated "I didn't know if I could do it again" and "[b]ecause it had been put off for so long. So I didn't want to keep continuing to go through it. So, yes, I took the plea." (App.p.128). Based on Respondent's own testimony, there is no reasonable probability that – but for Counsel's representation – he would have proceeded with the bench trial. See Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370; cf. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.") (emphasis added).

As demonstrated by Respondent's own testimony, he pled guilty – at least in part – so that he could have a resolution to this charge. The PCR judge, therefore, clearly

erred in finding Respondent pled guilty simply because he relied upon Counsel's advice. Respondent did not meet his burden of proving he was prejudiced by Counsel's representation. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

E.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance.

As Respondent failed to meet this burden of proving ineffective assistance of counsel, the PCR judge erred in granting Respondent's 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."). This Court must reverse the PCR judge's order, as it is not supported by any probative evidence. 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 issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR PETITIONER

September 28, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Guilty Plea Judge
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

---

Appellate Case No. 2015-000785

Edward Rorecuse Young, ...Respondent,

v.

State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

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

Brian P. Johnson, Esquire
The Law Office of Brian P. Johnson, LLC
522 North Church Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served. This 28th day of September, 2015.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR PETITIONER