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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-002709

Derrick Antron Young, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in the underlying proceedings by finding that the cumulative effect of trial counsel's errors in failing to provide full and fair representation of petitioner's rights under counsel's Constitutional obligation and failing to investigate the petitioner's case fully by questioning and/or subpoenaing necessary witnesses?
2. Did the circuit court lack jurisdiction over the Defendant because he pled guilty in Greenville County, yet the alleged offenses took place in Anderson County?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the December 2010 term of General Sessions for resisting arrest with assault (2010-GS-23-8605), at the April 2011 term for possession with intent to distribute (PWID) cocaine base (2010-GS-23-9819), and at the June 2012 term for trafficking cocaine (2011-GS-23-6189) and trafficking cocaine base (2011-GS-23-6190). (App.pp.102-04; pp.106-08; pp.110-12; pp.114-16).¹ Petitioner also waived presentment on the charge of failure to stop for a blue light (2012-GS-23-8436). (App.pp.122-24). Christopher T. Posey, Esquire represented Petitioner.

On October 9, 2012, Petitioner pled guilty.² (App.pp.15-43). The Honorable Letitia H. Verdin sentenced Petitioner to concurrent terms of 10 years for resisting arrest with assault, 13 years for PWID cocaine base, second offense, 13 years for trafficking cocaine (28-100 grams), second offense, 13 years for trafficking cocaine base (28-100 grams), first offense, and 3 years for failure to stop for a blue light. (App.pp.42-43; p.101; p.105; p.109; p.113; p.121). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on August 21, 2013 (2013-CP-23-4575). (App.pp.6-14). A hearing was held at the Greenville County Courthouse on August 28, 2014. (App.pp.45-90). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable James R. Barber, III denied relief in an order filed November 17, 2014. (Supp.App.pp.1-7).

¹ All citations to the Appendix are to the Amended Appendix.

² On the same date, Petitioner also pled guilty to several Anderson County charges: two counts of first-degree assault and battery (2011-GS-04-1069, -1070), PWID cocaine (2011-GS-04-1071), and unlawful carrying of a pistol (2011-GS-04-1072).

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 did not err in finding Petitioner failed to meet his burden of proving plea counsel was deficient.

Petitioner makes two main allegations of ineffective assistance of plea counsel. Petitioner argues he was not advised the plea judge could sentence him in excess of the plea recommendation. Petitioner argues he did not receive all of the discovery materials before he pled guilty. While Petitioner, in the verbiage of the Questions Presented section of his petition for writ of certiorari, also raises the allegation that plea counsel failed to investigate the case and subpoena necessary witnesses, he does not make specific arguments, refer to the record, or cite supporting authority. To the extent this allegation can be considered an issue on appeal, it should be deemed conclusory and not to be reviewed by this Court. See, e.g., State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority). Regardless, certiorari is not warranted because the two properly raised issues are neither meritorious nor supported by the record.

At the guilty plea hearing, the plea judge advised Petitioner of the minimum and maximum sentences he could receive for his charges, and he said he understood. (App.p.22). Plea counsel noted Petitioner was waiving venue on several Anderson County charges. (App.p.23). Petitioner stated he was satisfied with plea counsel's representation and had no complaints. (App.pp.24-25). Petitioner stated he was not pleading guilty as the result of coercion or promises. (App.p.26). Petitioner agreed to waive his right to trial and plead guilty. (App.pp.26-28). The assistant solicitor relayed the facts of the Anderson County charges. (App.pp.34-36). The assistant solicitor then relayed the facts of the Greenville County charges, which occurred on several different incident dates. (App.pp.36-39). The assistant solicitor noted there was no recommendation and Petitioner did not object. (App.p.39). Plea counsel spoke extensively in mitigation and asked for the minimum sentence. (App.pp.39-42). The plea judge, while noting plea counsel "argued well on your behalf," stated "this spring of charges right here is out of control. This is beyond the pail [sic]." (App.p.42).

At the PCR hearing, Petitioner confirmed plea counsel was retained to represent him on the Greenville and Anderson charges, and that they were handled at the same time. (App.p.52). Petitioner stated he and plea counsel did not review all of the discovery material, including chemical analysis reports, chain of custody forms, and pictures of evidence. (App.p.55). Petitioner stated he did not receive his discovery materials until after he pled guilty. (App.p.63). Petitioner stated plea counsel conveyed a seven-year plea offer from the State that was valid through October 4, 2012 and that – even after he failed to appear – he believed this offer was still valid. (App.pp.56-57).

Petitioner stated plea counsel said “I got you a seven year plea agreement between – that’s between me and [the plea judge]” and that the State was not involved. (App.p.53; p.57). Petitioner stated he expected to receive a seven-year sentence if he pled guilty. (App.pp.53-54).

Plea counsel testified he filed discovery motions and believed he received full discovery from the State. (App.p.78; p.81). Plea counsel testified he reviewed the discovery materials with Petitioner case-by-case as he received it. (App.pp.81-82; p.87). Plea counsel testified they reviewed the charges, the elements of the charges, and the possible penalties. (App.p.82). Plea counsel testified they “looked at all the discovery and all the issues” and then had discussions. (App.p.83). Plea counsel testified they met several times, both while Petitioner was out on bond and while he was at the detention center. (App.p.83). Plea counsel testified there was never a seven-year plea offer from the State. (App.p.85).³ Plea counsel testified he never had an understanding with the plea judge for a seven-year agreement. (App.p.85). Plea counsel testified Petitioner ultimately pled guilty without a sentence recommendation. (App.p.89). Plea counsel told Petitioner he would be pleading guilty without a recommendation and explained he could receive up to the maximum sentence on each charge. (App.p.85; p.86).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner “failed to meet his burden of proving plea counsel did not adequately meet with him to review the case.” (Supp.App.p.5). The PCR judge also found Petitioner “failed to

³ Plea counsel testified the only sort of agreement he ever had with the State was that Petitioner could plead guilty without a recommendation and the State would not object when counsel asked for a nine-year sentence. Plea counsel testified, however, Petitioner failed to appear and the State said any future plea would be without recommendation. (App.pp.85-86).

meet his burden of proving plea counsel misadvised that he would receive a seven-year sentence if he pled guilty.” (Supp.App.p.6). The PCR judge further found “there was no seven-year offer in this case and that [Petitioner] knew he was pleading guilty that day without a sentence recommendation.” (Supp.App.p.6).

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) (citations omitted).

A.

The PCR judge did not err in finding Petitioner “failed to meet his burden of proving plea counsel misadvised that he would receive a seven-year sentence if he pled guilty.” (Supp.App.p.6). Plea counsel testified he reviewed the sentence ranges for each of the charges with Petitioner. (App.p.82). The PCR judge found this testimony was credible. (Supp.App.p.5). Plea counsel also testified there was never a seven-year plea offer in this case. (App.p.85). The PCR judge specifically found this testimony was credible, as well. (Supp.App.p.6). This Court must give deference to this credibility

finding. 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."). The PCR judge noted Petitioner failed to present any evidence of a seven-year plea offer and found there was no such offer in this case and Petitioner knew he was pleading guilty without a sentence recommendation. (Supp.App.p.6).

There is probative evidence to support the PCR judge's finding. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626. Petitioner signed all of the sentencing sheets in this case. Each of these sheets has a box that is clearly marked that the plea was "Without Negotiations or Recommendation." (App.p.101; p.105; p.109; p.113; p.121). Further, the assistant solicitor noted during the guilty plea colloquy that there was no recommendation in this case and Petitioner did not object. (App.p.39). The guilty plea transcript, therefore, refutes any allegation that Petitioner was misadvised that he was pleading guilty in exchange for a seven-year recommendation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); 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). Thus, even assuming arguendo that plea counsel misadvised Petitioner about the recommendation,

any error was cured by the plea colloquy. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011); Burnett v. State, 352 S.C. 589, 593-94, 576 S.E.2d 144, 246 (2003). As such, there is probative evidence to support the PCR judge's finding that Petitioner failed to meet his burden of proving plea counsel misadvised that he was pleading in exchange for a seven-year sentence recommendation.

B.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving "plea counsel did not adequately meet with him to review the case." (Supp.App.p.5). Plea counsel testified he and Petitioner reviewed the various charges and the elements and penalties related to those charges. (App.p.82). Plea counsel testified he reviewed discovery materials with Petitioner as he received it and that they had discussions about these materials. (App.pp.81-83; p.87). The PCR judge specifically found plea counsel's testimony was credible on this issue. (Supp.App.p.5). This Court must give deference to this credibility finding. See Drayton v. Evatt, 312 S.C. at 13, 430 S.E.2d at 522; Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. at 567, 629 S.E.2d at 696. In contrast to plea counsel's highly credible testimony on this issue, Petitioner provided conflicting testimony regarding whether they reviewed discovery. Petitioner initially stated he and plea counsel did not review all of the discovery materials and that he never saw the chemical analysis reports, chain of custody forms, and pictures of evidence. (App.p.55). Petitioner, however, later stated he never discussed any of the discovery material with plea counsel. (App.p.63). Petitioner failed to meet his burden of providing credible evidence and testimony that plea counsel was deficient.

Regardless, Petitioner cannot prove he suffered any prejudice as the result of plea counsel's representation because the State presented overwhelming evidence of his guilt on these charges. See, e.g., Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). For the PWID crack cocaine charge (2010-GS-23-8615), Petitioner was arrested (after being the target of police surveillance) with 1.3 grams of crack cocaine on his person. (App.p.36). For the resisting arrest with assault charge (2011-GS-23-9819) charge, Petitioner threw down a container with crack cocaine and then hit and kicked officers while they attempted to handcuff him. (App.p.37). For the trafficking cocaine (2011-GS-23-6189) and trafficking crack cocaine (2011-GS-23-6190) charges, bags of these substances fell from Petitioner's pants pockets while he was running from police. (App.pp.37-38). For the failure to stop for a blue light charge, Petitioner fled from police at a high rate of speed when an officer attempted to stop his vehicle for disregarding a stop sign. (App.pp.38-39). As such, even assuming arguendo that plea counsel did not thoroughly review discovery materials with him, Petitioner cannot demonstrate he suffered any prejudice because – due to the overwhelming evidence of his guilt – there was no reasonable probability of a different result in his case. See id.; see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

C.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that

plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel, 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.”).

II. The issue of whether the plea judge lacked jurisdiction to accept Petitioner’s guilty plea for second-degree burglary is not properly before this Court.

In his petition for writ of certiorari, Petitioner argues he “plead [sic] guilty to burglary second in Greenville County on October 9, 2012 and at no time did he waive presentation to the Grand Jury or jurisdiction to the burglary second charge.” Petitioner concedes he is raising this issue for the first time in his petition for writ of certiorari.

This issue is not properly before this Court. Petitioner did not plead guilty on October 9, 2012 to a charge of second-degree burglary (from either Greenville County or Anderson County). A second-degree burglary charge is not included in the charges recited at the start of the plea hearing. (App.pp.19-20). A second-degree burglary charge is not included in the charges upon which the plea judge levied sentences. (App.pp.42-43). A second-degree burglary charge is not included in the Appendix. (App.pp.93-160). Petitioner has failed to present an arguable issue that is supported by the record. See Goodson v. American Bankers Ins. Co. of Florida, 295 S.C. 400, 404, 368 S.E.2d 678, 690 (Ct. App. 1988) (noting the appellant is responsible for compiling an adequate record

and finding the appellate court “will not consider facts that do not appear in the transcript of record”). Furthermore, this issue is raised in a conclusory fashion and should be denied by this Court. See State v. Howard, 384 S.C. at 217, 682 S.E.2d at 45; Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (holding a “one-sentence argument is too conclusory to present any issue on appeal”); Williams v. Leventis, 290 S.C. 386, 390, 350 S.E.2d 520, 523 (Ct. App. 1986) (holding an “argument [that] is embraced in a single sentence on the last page of [appellant’s] brief [and] not supported by any authority whatever . . . may be viewed as effectively abandoned”).

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 issues discussed above.

Respectfully submitted,

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By: 
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November 30, 2015

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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:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.
This 30th day of November, 2015.


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