STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

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Appellate Case No. 2015-001439

Frank Daniel Simpson, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the PCR judge err in finding plea counsel failed to advise the Respondent there was a mandatory minimum sentence?

2. Did the PCR judge err in finding both that plea counsel was ineffective in requesting a suspended sentence of house arrest and that he failed to articulate a valid strategic reason he requested such a sentence?

3. Did the PCR judge err in finding Respondent would not have pled guilty but for plea counsel's advice?

STATEMENT OF THE CASE

The December 2011 term of the Greenville County Grand Jury indicted Respondent for trafficking methamphetamine (2011-GS-23-9272). (App.pp.144-46). Cameron G. Boggs, Esquire represented Respondent.

On February 13, 2013, Respondent pled guilty to trafficking methamphetamine (28-100 grams), first offense. (App.pp.1-35). The Honorable Letitia H. Verdin sentenced Respondent to nine (9) years imprisonment. (App.p.34; p.143). Respondent did not appeal.

Respondent filed an application for post-conviction relief (PCR) on January 28, 2014 (2014-CP-23-0531). (App.pp.36-40). A hearing was held at the Greenville County Courthouse on December 17, 2014. (App.pp.46-81). Respondent was present and represented by E. Charles Grose, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an amended order of dismissal filed March 19, 2015, the Honorable Eugene C. Griffith, Jr. denied relief. (App.pp.83-90).

Respondent filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP and the State filed a return. (App.pp.91-107; pp.108-10). A hearing on the motion was held on May 7, 2015 at the Newberry County Courthouse. (App.pp.111-33). Mr. Grose represented Respondent and Joshua L. Thomas, Esquire of the South Carolina Attorney General's Office represented the State. On June 9, 2015, Judge Griffith filed an order granting Respondent's motion and ordering a new trial. (App.pp.135-42).

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 erred in finding plea counsel failed to advise the Respondent there was a mandatory minimum sentence.

Certiorari is warranted in this case because the PCR judge incorrectly found plea counsel did not advise the Respondent there was a mandatory minimum sentence in this case. The PCR judge's finding is not supported by the record.

At the guilty plea hearing, the plea judge advised Respondent the sentence range for his offense "carries a minimum sentence of seven years and up to 30 years" and Respondent stated he understood. (App.p.7). Plea counsel acknowledged during his lengthy mitigation argument there was "a statutory minimum" and that Respondent was facing "7 to 30 years." (App.p.25; p.26).

At the PCR hearing, Respondent admitted plea counsel advised him the sentence range for this charge was seven to twenty-five years and that he knew on the day of the plea hearing that he could receive a sentence in that range. (App.p.75). Respondent also stated he and plea counsel discussed the possibility of a sentence less than the mandatory minimum sentence of seven years. (App.p.68).

Plea counsel testified he was aware there was a mandatory minimum sentence of seven years for Respondent's charge. (App.p.52). Plea counsel testified he told Respondent the mandatory minimum sentence was seven years. (App.p.55). Plea counsel testified Respondent "was not expecting to get less than seven" years. (App.p.61).

In granting Respondent's application for post-conviction relief, the PCR judge found "counsel did not advise [Respondent] that the minimum sentence is mandatory and cannot be suspended." (App.p.141).

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).

The PCR judge erred in finding plea counsel did not advise there was a mandatory minimum sentence for his charge. This finding is refuted by both the guilty plea and PCR transcripts. During both proceedings, Respondent acknowledged he was aware the mandatory minimum sentence was seven years. Respondent admitted at the PCR hearing that plea counsel advised him of such and that he knew he could receive a sentence

between seven and twenty-five years. As such, the PCR judge committed error in finding plea counsel had not advised Respondent of the minimum sentence. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007) (noting the guilty plea transcript clearly refuted applicant's allegation that he did not understand the terms of the guilty plea); 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).

Respondent is a highly educated and intelligent individual – having received degrees from the University of North Carolina, North Carolina State University, and Williams College and pursing further coursework and studies at Harvard University. (App.p.66). The plea judge noted Respondent's background was "absolutely amazing" and remarked he is "extremely intelligent." (App.p.20; p.34). Respondent clearly understood what the word "minimum" meant and that one could not receive something less than the minimum. As such, even assuming arguendo that plea counsel misadvised the Applicant about the sentencing range in his case (which included a mandatory minimum sentence of seven years), any error was cured by the plain language of the plea colloquy. The plea judge advised Respondent the sentence range for his offense "carries a minimum sentence of seven years and up to 30 years" and Respondent stated he understood. (App.p.7). Further, Respondent voices no objection or confusion when plea counsel noted during the mitigation portion of the plea that there was a "statutory minimum" for Respondent's charge. (App.p.32). As such, any alleged deficiency in plea

counsel's representation and advice on this issue was cured by the plea judge's advisement that there was a minimum seven year sentence. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011); see also Bennett v. State, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006) (reversing grant of PCR and stating that "even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range"); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (reversing grant of PCR and holding that even if plea counsel erroneously informed defendant that his sentence would only be three years, the information conveyed at the plea hearing cured any misconception caused by counsel's alleged inaccurate advice).

The record clearly demonstrates plea counsel advised Respondent of the minimum sentence of seven years imprisonment, the plea judge also made this advisement, and that Respondent understood. There is no evidence of probative value to sustain the PCR judge's finding on this issue. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea 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 plea counsel's performance. As Respondent failed to meet this burden of proving ineffective assistance of plea 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.").

II. The PCR judge erred in finding both that plea counsel was ineffective in requesting a suspended sentence of house arrest and that he failed to articulate a valid strategic reason he requested such a sentence.

Certiorari is warranted in this case because the PCR judge incorrectly found plea counsel did not articulate a valid strategic reason that he requested a suspended sentence of house arrest in this case. The PCR judge's finding is not supported by the record.

At the guilty plea hearing, plea counsel gave a lengthy mitigation argument and handed up documents titled "Defendant's Pre-Sentencing Memorandum" and "Mitigating Factors and Extenuating Circumstances" to the plea judge. (App.pp.20-27). Plea counsel confirmed the assistant solicitor's earlier comment that Respondent was pleading guilty pursuant to a recommendation of a fifteen-year cap. (App.p.19; pp.25-26). Plea counsel noted the charge was "reduced now to 7 to 30 but, Your Honor, you have the ability to treat each person individually." (App.p.24). Plea counsel stated:

> Judge, I know there's a statutory minimum, but just as a point of reference, as you know, there's an annotated statutory provision that said any sentence can be suspended by a judge even though this says not suspended sentence. . . . He can do house arrest, Judge, He can make it. He would want it.

(App.p.26). Plea counsel noted he had given assistance to the State on several matters while he was at the jail. (App.pp.23-26).

At the PCR hearing, Respondent acknowledged plea counsel advised him the State had a strong case against him. (App.p.74). Respondent stated he and plea counsel had discussions about possible "creative sentences" less than the mandatory minimum sentence of seven years. (App.p.68). Respondent stated plea counsel said a judge could

suspend any sentence and that they also discussed home detention. (App.p.69). Respondent stated he believed the judge could order any of these things. (App.p.71). Respondent stated he knew plea counsel would ask the judge for a sentence of house arrest and that, while he was under the impression that he could receive this sentence, he was not under the impression that he would. (App.pp.75-76).

Plea counsel testified he was aware there was a mandatory minimum seven year sentence in this case but that he requested a suspended sentence of house arrest (both in his pre-hearing memorandum and before the plea judge). (App.p.52). Plea counsel testified the statute did not allow for such suspension but that "in the real world" it had been done before so he decided to ask for it. (App.pp.52-53). Plea counsel testified he noted in his pre-hearing memorandum that downward departures often occurred in federal court. (App.pp.53-54). Plea counsel also testified "[t]his particular judge had done it before." (App.p.54). Plea counsel testified, however, that "[a]t no point in time did [Respondent] ever think – or excuse me, did he ever hear from me that he was getting house arrest or that he was not going to prison." (App.p.55). Plea counsel testified he told Respondent he was going to request house arrest, that he "was going to ask for it, and this judge had done it before. But that the mandatory minimum was seven years. . . . And that the statute said it couldn't be suspended." (App.p.55). Plea counsel testified Respondent's family had the financial means to pay for fines or in-patient treatment. (App.pp.56-57). Plea counsel testified Respondent "never expected anything other than a chance" and that Respondent "was not expecting to get less than seven." (App.p.60; p.61).

In granting Respondent's application for post-conviction relief, the PCR judge found plea counsel was ineffective for advising Respondent to seek a fine and suspended sentence because this was not available under state law for the offense. (App.p.141). The PCR judge found plea counsel was ineffective for advising Respondent that he would request house arrest because it is not available for Respondent's trafficking charge. (App.p.141). The PCR judge found plea counsel's strategy was "objectively unreasonable." (App.p.142).

The PCR judge erred in finding plea counsel was ineffective in pursuing the strategy of asking the plea judge for a suspended sentence of house arrest in this case. Plea counsel testified that, while he understood there was a mandatory minimum sentence in Respondent's case, he was aware of circumstances in which the plea judge had deviated from the sentencing scheme and suspended the sentence to house arrest. Plea counsel testified he explained this to Respondent. Plea counsel testified Respondent was very intelligent and knew he faced a minimum seven-year sentence and that the request for a suspended sentence of house arrest was merely hopeful. Plea counsel articulated a valid reason for pursuing this strategy. He fully explained to Respondent that this request may not be successful (and that he should expect to receive an active sentence) but that you have to make the request in order to see if the judge will accept it. Respondent was clearly advised of the potential advantages of following plea counsel's strategy but was just as clearly advised not to expect that he would actually receive the suspended sentence of house arrest. 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)). Plea counsel testified both he and Respondent knew they were asking the plea judge for "a chance" with this strategy. Based on plea counsel's knowledge that the plea judge had entertained such an option in a previous case and Respondent's minor prior record and ability to pay for the costs associated with house arrest, this was a valid strategic decision made with the full knowledge and consent of a highly educated and intelligent defendant.

While Respondent may have hoped to receive a suspended sentence of house arrest – based on his own testimony, he was clearly not promised that he would receive such a sentence. Respondent even noted at the plea hearing that he had received no promises in exchange for his guilty plea. (App.p.9). Respondent also never indicated during his mitigation speech to the plea judge that he expected a suspended sentence of house arrest. (App.pp.31-32). "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Holden v. State, 393 S.C. at 575-76, 713 S.E.2d at 617 (citing Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)). Respondent knew plea counsel was attempting to have the plea judge subvert the statutory scheme and suspend the sentence to house arrest and chose to proceed with that strategy. While Respondent may have wished for the strategy to be successful, he clearly knew his sentence had a

mandatory minimum of seven years imprisonment.

Plea counsel was well aware there was a statutory minimum sentence for Respondent's charge and he advised Respondent of such. Plea counsel chose to entertain an unusual strategy in hopes the plea judge would depart from this statutory minimum and levy a suspended sentence of house arrest. Respondent understood this was a long shot and that he should expect to receive at least a seven year sentence. This was a valid trial strategy and Respondent's wishful thinking about the sentence he hoped to receive did not equate to a misapprehension of the trial strategy. Based upon the record before this Court, there is no evidence of probative value to sustain the PCR judge's finding on this issue. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea 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 plea counsel's performance. As Respondent failed to meet this burden of proving ineffective assistance of plea counsel, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The PCR judge erred in finding Respondent would not have pled guilty but for plea counsel's advice.

Certiorari is warranted in this case because the PCR judge incorrectly found Respondent would not have entered a guilty plea but for plea counsel's advice. The PCR judge's finding is not supported by the record.

During the guilty plea hearing, the assistant solicitor relayed the underlying facts of the case. Respondent was stopped on Interstate 85 for traffic violations. Respondent acknowledged to the officer that his driver's license was suspended and he could not find the vehicle registration. The officer gave Miranda[1] rights to Respondent and Respondent admitted he had a syringe loaded with methamphetamine on his person. Respondent was arrested and a subsequent search of the vehicle yielded needles, spoons, scales, paraphernalia, and a bag containing 34.20 grams of methamphetamine (this was located in the center console of the vehicle). Respondent "did admit [to the officer] that he was delivering the meth from Atlanta to North Carolina." (App.pp.18-19). It was also noted at the plea hearing that Respondent was on probation from a possession of methamphetamine charge in Anderson County when he was arrested. (App.pp.19-20).

At the PCR hearing, Respondent stated he would have gone to trial if he had known a sentence of house arrest was not possible. (App.p.73). Respondent stated he would have gone to trial even though there were loaded syringes of methamphetamine in his vehicle, a bag of methamphetamine in his vehicle, and his own statement that the drugs were his. (App.p.76).

Plea counsel testified he and Respondent discussed whether he wanted a trial in this case and that "all along it was never a trial because it was a second offense." (App.p.59). Plea counsel testified that his representation "was always talking about mitigation and trying to work out the best deal possible." (App.p.59).

In granting Respondent's application for post-conviction relief, the PCR judge

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

found Respondent "would not have plead [sic] guilty but for the erroneous advice." (App.p.142).

The PCR judge erred in finding Respondent would not have pled guilty but for plea counsel's advice. As discussed supra, Respondent was aware there was a minimum sentence he would receive and that asking for a suspended sentence of house arrest was merely a chance they would take. But the State had overwhelming evidence of Respondent's guilt. Respondent was pulled over in a lawful traffic stop and was discovered to have drugs both on his person and in his vehicle. Despite Respondent's protestations that the methamphetamines were for personal use, he admitted to the arresting officer that he was delivering them from one state to another and plea counsel stated in mitigation that only one of the four packages of methamphetamines was for personal use. (App.p.21). The overwhelming evidence of Respondent's guilt negated any claim of plea counsel's allegedly deficient performance. See 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); 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). Respondent's testimony is further suspect and self-serving because he was unable to articulate why he believed he would have had better success at a jury trial. Respondent merely made a vague statement that "[t]here's other things at trial that, you know, might, have been available to me if I had explored that." (App.pp.76-77). In addition to all of the State's evidence, Respondent was on

probation from another methamphetamine conviction when he was arrested in the instant case. Based on the foregoing, there is simply no reasonable probability that he would have gone to trial on this trafficking charge. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370.

The record before this Court – in which the State produced overwhelming evidence of Respondent's guilt – clearly demonstrates there was no reasonable probability Respondent would have gone to trial in this case. As such, there is no evidence of probative value to sustain the PCR judge's finding on this issue. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea 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 plea counsel's performance. As Respondent failed to meet this burden of proving ineffective assistance of plea counsel, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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 issues discussed above fully.

Respectfully submitted,

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By: Karen Ratigan
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January 13, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

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Appellate Case No. 2015-001439

Frank Daniel Simpson, ...Respondent,

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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:

E. Charles Grose, Jr., Esquire
Grose Law Firm
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I further certify that all parties required by Rule to be served have been served. This 13th day of January, 2016.

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