

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015 – 000993
Lower Court Case No. 2012-CP-42-4713

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SC SUPREME COURT

Addie Thilavanh, #347337,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT4

 Certiorari is not warranted where Petitioner pleaded guilty after
 Counsel properly advised Petitioner that the felony DUI charge
 could be challenged because the statutory requirements set forth in
 S.C. Code § 56-5-2953 may not have been complied with. 4

CONCLUSION7

PETITIONER'S QUESTION PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pleaded guilty where, because of plea counsel's failure to advise, Petitioner had no knowledge that his charges could be dismissed as law enforcement had failed to comply with S.C. Code Ann. § 56-5-2953 by not videotaping Petitioner's field sobriety tests and not producing an affidavit justifying their failure to satisfy statutory video recording requirements?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the November 2010 term of the Spartanburg County Grand Jury for felony DUI – death and reckless homicide (2012-GS-42-7712, count 1 and count 2). Petitioner was represented by Richard Whelchel, Esquire. On December 5, 2011, Petitioner pleaded to felony DUI – death¹. Petitioner was sentenced by the Honorable J. Mark Hayes II to twenty (20) years' imprisonment.

Petitioner filed a timely Notice of Appeal. The South Carolina Court of Appeals dismissed the appeal for failure to show any issue ruled upon by the trial court on November 23, 2011. The Court also construed several filings as a Petition for Rehearing, which they also denied on February 3, 2012. The Remittitur was returned on October 31, 2012.

Petitioner then filed an application for post-conviction relief on November 12, 2012. Respondent filed a Return on March 3, 2014. An evidentiary hearing was held on September 19, 2014, at the Spartanburg County Courthouse. Petitioner was represented by Christopher D. Brough, Esquire. The State was represented by J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office. The Honorable Roger L. Couch issued an Order of Dismissal on May 8, 2015, denying relief.

Petitioner filed a notice of appeal on May 5, 2015. A Petition for Writ of Certiorari was on November 13, 2015. This Return follows.

¹ The charge of reckless homicide was *not prossed*.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Certiorari is not warranted where Petitioner pleaded guilty after Counsel properly advised Petitioner that the felony DUI charge could be challenged because the statutory requirements set forth in S.C. Code § 56-5-2953 may not have been complied with.

Petitioner argues the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pleaded guilty. Specifically, he argues Counsel was ineffective for failing to advise Petitioner that the charge could be challenged on a statutory basis. Respondent submits Petitioner knowingly, voluntarily, and intelligently pleaded guilty because he was aware that he could have moved to have the charge dismissed because of issues with the lack of a video recording. Petitioner then pleaded guilty with that knowledge.

Relevant Law

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). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). 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).

Discussion

Certiorari is not warranted where the record supports the PCR court's finding that the plea was knowingly, voluntarily, and intelligently made and where Petitioner waived any challenges to the evidence by pleading guilty. Petitioner argues his guilty plea was not made knowingly and voluntarily because Counsel failed to advise that the charges could be challenged and possibly dismissed. This argument is meritless for many reasons, but chiefly because the PCR court found Counsel's testimony credible that he advised Petitioner there was a chance the charges could be dismissed. (App. p. 132) ("[T]his Court finds Applicant's testimony and assertions to be not credible."). "We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). There is also evidence to support the PCR court's ruling that Petitioner knowingly, voluntarily, and intelligently pleaded guilty with full knowledge that he could have moved to have the charges dismissed due to the lack of a video. Notably, Petitioner's testimony that he was not advised that the charges could be challenged was found to be not credible. Counsel advised Petitioner that he could have filed a motion challenging the charges based on the trooper's failure to submit a video recording of the incident and the breath site. (App. p. 89, line 22 – p. 90, line 3; p. 91, lines 19-22; p. 94, lines 10-19). Counsel credibly testified he advised Petitioner that if the motion was granted that the case could be dismissed but cautioned that the decision would ultimately be up to a judge or possibly an appellate panel. (App. p. 94, lines 10-19). Counsel testified that after this conversation, Petitioner decided he wanted to plead guilty. (App. p. 94, lines 10-19).

Additionally, the PCR court found Petitioner's testimony that he would have proceeded to trial had he known the charge could be challenges to be not credible. This ruling is supported

by Counsel's testimony and by the guilty plea transcript. Counsel testified that he considered this case to be a plea from the beginning and that Petitioner made it clear that he wanted to plead guilty rather than taking the case to trial. (App. p. 50, lines 6-15).

Finally, Petitioner waived any challenge to the evidence after he knowingly pleaded guilty. He cannot now go back and challenge Counsel's performance and the trial court's evidentiary rulings. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably, the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Because Petitioner pleaded guilty and was found to have done so knowingly and voluntarily, Respondent asks this Court to deny the petition.

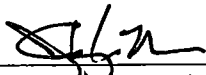
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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March 7, 2016

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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

John H. Strom, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
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This 7th day of March, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT