



ALAN WILSON
ATTORNEY GENERAL

April 22, 2016

VIA HAND DELIVERY

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

RECEIVED
APR 22 2016
SC SUPREME COURT

RE: Derrick S. Prescott v. State of South Carolina
Appellate Case No: 2015-001343

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,

J. Croom Hunter
Assistant Attorney General
Bar No: 101253

JCH/nb
Enclosures

.cc: Wanda H. Carter, Esquire (2 copies)

STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 22 2016

SC SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Post-Conviction Relief Judge

Derrick Prescott,.....Petitioner,

v.

State of South Carolina,.....Respondent.

Appellate Case No. 2015-001343

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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TABLE OF CONTENTS

QUESTION PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW4

ARGUMENT.....5

The lower court properly found that Petitioner knowingly and voluntarily pled guilty.

CONCLUSION.....9

ISSUE PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI

1. The state's drug conviction against petitioner was obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963), because petitioner was not allowed to view the videotape of the recorded transaction that gave rise to the distribution of crack cocaine charge in the case.

RESPONDENT'S QUESTION PRESENTED

1. Did the lower court properly find that Petitioner knowingly and voluntarily pled guilty?

STATEMENT OF THE CASE

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the March 2010 term of the Florence County Grand Jury for possession of a stolen pistol (2010-GS-21-0064), distribution of cocaine, third offense (2010-GS-21-1031), possession of marijuana with intent to distribute, third offense (PWID), and possession of marijuana with intent to distribute within proximity of a school or park. Applicant was represented by A. Grayson Smith, Esquire.

On January 27, 2011, Applicant pled guilty as indicted to PWID and the pistol charge. Applicant also pled guilty to the lesser included offense of distribution of cocaine base, second offense. The proximity charge was dismissed. The Honorable Thomas A. Russo sentenced Applicant to concurrent terms of ten years on the drug charges and five years on the pistol charge. Applicant did not appeal.

The Applicant filed an Application for Post-Conviction relief on July 24, 2011. The State filed its return, and an evidentiary hearing was convened on April 14, 2015 at the Florence County Courthouse. The Applicant was represented by Jonathan Waller, Esquire. The State was represented by J. Croom Hunter of the South Carolina Office of the Attorney General. The Honorable D. Craig Brown denied relief in an order filed June 1, 2015. (App.pp.70-79).

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

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal

defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

1. The lower court properly found that Petitioner knowingly and voluntarily pled guilty

Petitioner argues "The state's drug conviction against petitioner was obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963), because petitioner was not allowed to view the videotape of the recorded transaction that gave rise to the distribution of crack cocaine charge in the case." (Cert. Pet. p.4). Not only is the argument without merit, but it presents an issue that is more appropriate for direct appeal, not post-conviction relief. Respondent submits the appropriate question to address is whether the PCR Judge properly found Petitioner knowingly and voluntarily pled guilty. Respondent submits the PCR Judge's ruling was correct.

At the PCR hearing, Petitioner alleged that his guilty plea was involuntary because he was not allowed to view the video of the drug buy starring himself and the confidential informant. However, Respondent submits the knowing and voluntary nature of Petitioner's guilty plea is evident from the plea transcript. During the guilty plea, the judge went over the various constitutional rights Petitioner waived by pleading guilty. In particular, the judge told Petitioner the following:

The Constitutional [sic] of the United States says that any person charged with a criminal offense has the right to face their accusers. And what that means is that during the course of that trial and

during the course of the trial we started yesterday, Mr. Smith on your behalf had the opportunity to cross-examination [sic] the State witnesses, to question them about their testimony before the jury. That's your right of confrontation under the Constitution. But when you plead guilty, you give up that presumption of innocence and you give up the right to confront the State's witnesses. Do you understand, sir?

(App.p.9, lines 1-12).

The judge continued to review Petitioner's additional constitutional rights before asking Petitioner, "Understanding that, do you still want to go forward with your plea, sir?" (App.p.11, lines 5-6). Petitioner never waived in any of the answers he gave the plea judge. Additionally, Petitioner affirmed to the judge he was pleading guilty of his own free will, and that he was guilty. (App.p.13, lines 15-20). Finally, after the solicitor's recitation of the facts, in which the solicitor told the judge that Petitioner was caught on video selling drugs to a confidential informant, Petitioner affirmed to the judge that the solicitor's summary of the evidence against Petitioner was true. (App.pp.14-15).¹ Based upon the transcripts of the plea and the PCR hearing, it is clear that Petitioner made a well informed and voluntary choice to plead guilty, and the PCR judge correctly found that Petitioner failed to meet his burden of showing that his plea was involuntary. As such, the petition should be denied.

Furthermore, any alleged ineffectiveness on the part of plea counsel is not prejudicial because of the overwhelming evidence of Petitioner's guilt. A reasonable probability of a different result does not exist when there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991); see also Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114 (2002); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994); Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147

¹ Respondent notes that Petitioner never raised any concerns with the Plea Judge about not having seen the video of the CI buy.

(2008). At the PCR hearing, Petitioner testified he was not allowed to see the video of the CI buy prior to his guilty plea. (App.pp.44-45). However, Plea Counsel testified that it is the policy of the solicitor's office not to allow defendants to view videos of undercover buys because they do not want to unnecessarily reveal the identities of their informants. Counsel testified he was personally allowed to view the video, and it clearly showed Petitioner selling the drugs to the informant. Counsel testified that after viewing the tape, he believed it was in Petitioner's best interest to plead guilty. (App.pp.55-58). As the evidence before the PCR judge indicated that Petitioner chose to plead guilty because the video clearly showed him selling the drugs, Petitioner failed to meet his burden of proving any prejudicial effect. Accordingly, the Petition should be denied.

Petitioner failed to meet his burden of proving that plea counsel provided ineffective assistance of counsel. Petitioner has failed to satisfy either prong of the Strickland test: counsel's conduct was not so egregious that it fell below prevailing professional norms, nor was Petitioner so prejudiced by counsel's conduct that a different outcome would likely have occurred. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, 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.").

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 issue discussed above.

Respectfully submitted,

ALAN WILSON
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By: 
ATTORNEYS FOR RESPONDENT

4/20, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

The Honorable D. Craig Brown, Circuit Court Judge

DERRICK S. PRESCOTT,

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:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 22nd day of April, 2016.


NORMA BIGBEE
LEGAL ASSISTANT