

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County
Court of Common Pleas
The Honorable D. Craig Brown, Circuit Court Judge

2014-CP-26-7332
Appellate Case No. 2016-000658

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JAN 27 2017

S.C. SUPREME COURT

GREGORY GREEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTION PRESENTED

Is there any probative evidence in the record to support the PCR Court's finding that Petitioner's guilty plea was entered into freely, voluntarily, knowingly, intelligently, and absent ineffective assistance of counsel, where Petitioner's Plea Counsel advised Petitioner that he was pleading to a lesser included offense of his original charge?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2013, the Horry County Grand Jury indicted Petitioner for Trafficking in Heroin (2013-GS-26-04803). Stuart Mark Axelrod, Esquire, represented Petitioner. On May 29, 2014, Petitioner pled guilty to the lesser included offense of Trafficking in Heroin, 4 - 14 grams, 1st offense. The Honorable Roger M. Young, Sr., sentenced Petitioner to ten (10) years imprisonment and a fine of fifty thousand dollars (\$50,000). Petitioner did not appeal his plea or sentence.

Petitioner filed a PCR application on November 5, 2014 (2014-CP-26-7332), alleging he was being held in custody unlawfully. An evidentiary hearing was convened on February 11, 2016. Petitioner was present and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office represented the Respondent. The Honorable D. Craig Brown denied and dismissed the PCR application by order filed March 11, 2016.

Petitioner filed a notice of appeal. His attorney submitted a petition for writ of certiorari and appendix on October 24, 2016. This return follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR 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

There is probative evidence in the record to support the PCR Court's finding that Petitioner's guilty plea was entered into freely, voluntarily, knowingly, intelligently, and absent ineffective assistance of counsel, where Petitioner's Plea Counsel advised Petitioner that he was pleading to a lesser included offense of his original charge.

There is probative evidence to support the lower court's findings. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's

unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial." Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

This Court should uphold the PCR judge's findings because there is ample, probative evidence in the record to support them. Petitioner alleged he received incorrect advice from Counsel regarding his guilty plea to a lesser included offense. App. p. 38-40. The PCR judge found Petitioner "failed to meet his burden to show plea counsel rendered ineffective assistance of counsel." App. p. 65. The PCR judge also found Petitioner's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. App. p. 67.

The record shows no misunderstanding of the charge to which the Petitioner was pleading guilty, but rather a misunderstanding of the term "lesser included offense." Petitioner

stated he was told repeatedly and fully understood that he was pleading to a lesser included offense. App. p. 38-40. Plea counsel also stated he had informed the Petitioner that he would be pleading guilty to a lesser included offense that was categorized as violent and serious. App. p. 51. Petitioner was also aware that his original trafficking second charge carried a minimum mandatory sentence of twenty-five (25) years' imprisonment and the trafficking first charge to which he pled guilty carried a minimum mandatory of seven (7) years' imprisonment and maximum twenty-five (25) years. App. p. 45-46. Petitioner conceded his goal in pleading to a lesser included offense was to receive less punishment. App. p. 47. Petitioner's misunderstanding of the term "lesser included offense" was through no fault of his plea counsel.

The test for determining whether a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all of the elements of the lesser offense. State v. Northcutt, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007) (citing Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997)). If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. Id. Here, the charge to which Petitioner pled guilty, trafficking in heroin, first offense, does not contain any additional elements not included in the charge in which Petitioner was indicted, trafficking in heroin, second offense. Because there are no additional elements, by definition, trafficking in heroin, first offense, is a lesser included offense of the trafficking in heroin, second offense. Additionally, the enhancement for a second offense is not an element of the offense, but only a sentencing consideration. Carter v. State, 329 S.C. 355, 363, 495 S.E.2d 773, 777 (1998) (Statute provided for greater sentence for second offense of manufacturing methamphetamine than for other Schedule II drugs and therefore Statute does not define a separate crime, but only an enhanced punishment. Because the elements for a first offense and second offense were

exactly the same, the guilty plea judge had subject matter jurisdiction to accept plea). That same sentencing consideration was the premise upon which Petitioner based his decision to freely and voluntarily plead guilty to the lesser included offense. App. p. 47.

Furthermore, "the state may [...] offer a defendant, charged with a greater offense, an opportunity to plead guilty to a lesser offense, notwithstanding the factual basis does not precisely comport with the lesser offense." Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). (footnotes omitted). "[S]o long as there [is] a sufficient factual basis to support the crime for which the defendant was indicted, a plea to any lesser included offense is sufficient. Id. at 58. (citing Accord U.S. v. Thompson, 680 F.2d 1145 (7th Cir.1982), *cert. denied* 459 U.S. 1089, 103 S.Ct. 573, 74 L.Ed.2d 934 (1982) (purpose of requiring factual basis for guilty plea is to assure court that conduct which defendant admits by his plea of guilty constitutes offense charged in indictment or lesser offense included therein)). As part of a generous plea deal, Petitioner pled to trafficking in heroin, first offense, which includes all of the same elements as his indicted charge of trafficking in heroin, second offense. The record shows there was a sufficient factual basis to support the crime for which the defendant was indicted and thus a plea to the lesser included offense was sufficient.

The record fails to demonstrate any deficiency perpetrated by Petitioner's plea counsel in this case. The record also demonstrates Petitioner's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. Because the record contains probative evidence that supports the PCR judge's finding that counsel's performance was not deficient and that Petitioner failed to show that but for counsel's alleged deficient performance, he would not have pleaded guilty, but would have insisted on going to trial, certiorari should be denied.


CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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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:

Ms. Wanda H. Carter, Esquire
SC Commission on Indigent Defense
PO Box 11589
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This 27th day of January, 2017


MALLORY MORRIS
Legal Assistant for Respondent