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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO EDGEFIELD COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No.: 2016-000243

TOMMIE L. PIXLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

Return to Petition for Writ of Certiorari

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COUNTER ISSUE PRESENTED

I. The PCR Judge did not err in finding the guilty plea was not rendered involuntary where plea counsel advised Petitioner his parole eligibility would be between 65% and 85% of his sentence.

STATEMENT OF FACTS

Summary of the Plea Hearing

Petitioner pleaded guilty before the Honorable R. Knox McMahon on February 9, 2015. The plea began with the solicitor outlining that Petitioner had indicated he wanted to plead guilty to distribution of crack second offense for a negotiated five year sentence. (App. p. 3, ll. 3-6.) The Court advised Petitioner that he was facing between five and thirty years if he pleaded guilty to this charge, which Petitioner confirmed he understood. (App. p. 6, ll. 3-8.) The Court advised Petitioner that by pleading guilty he was giving up "very important constitutional rights" like the right to remain silent, right to a jury trial, right to confront witnesses. (App. p. 7, ll. 2-7.) Petitioner indicated he understood and that he still wished to plead guilty. (App. p. 7, ll. 8-16.) Petitioner informed the plea court he was pleading guilty, was in fact guilty, and did commit the crime of distributing crack cocaine on May 2, 2013. (App. p. 7, l. 17-p. 8, l. 2.) The Court asked Petitioner "[h]as anyone promised you anything or held out any type of reward to get you [to] plead guilty?" (App. p. 8, ll. 19-20.) Petitioner said "no, sir" to both that question and the court's question about whether anyone had threatened or used force to get him to plead guilty. (App. p. 8, ll. 19-24.) Petitioner also informed the Court he did have enough time to speak with his attorney and did understand his talks with his attorney. (App. p. 9, ll. 9-24.) The plea court offered Petitioner an opportunity to ask the Court questions, but Petitioner indicated he had no questions. (App. p. 10, ll. 9-11.)

The solicitor explained the underlying facts of the charge: Petitioner distributed a quantity of crack cocaine to an undercover operative working under the control of the Edgefield County Sheriff's Office Narcotics Division. (App. p. 10, ll. 17-22.) The drugs did test positive as

crack cocaine. (App. p. 10, l. 22.) And, Petitioner did have a qualifying prior offense to make this a second drug offense. (App. p. 10, ll. 23-25.)

The Court accepted the plea. (App. p. 11, ll. 1-8.) Petitioner's plea counsel provided information on Petitioner's background and asked for five hundred and seventy five days of time served credit. (App. p. 11, l. 17-p. 12, l. 10.)

Summary of Testimony at the PCR Hearing

Petitioner testified his plea counsel was not the first attorney to represent him in this criminal matter. Petitioner's earlier attorneys were either relieved or conflicted out, until Andrew Farley, his plea counsel, was appointed. (App. p. 44, l. 21- p. 45, l. 10.) Petitioner said he met with plea counsel a couple of days before the plea. (App. p. 45, ll. 11-23.) He further stated counsel told him he would get a five year sentence and only serve sixty-five percent of that time in prison. (App. p. 47, ll. 4-11.) Petitioner said he would not have pleaded guilty otherwise. (App. p. 47, ll. 12-15.)

On cross-examination, Petitioner acknowledged the judge told him the offense to which he was pleading carried a range of five to thirty years imprisonment. (App. p. 52, ll. 17-21.) He also said he understood the Solicitor said it was a negotiated five year sentence. (App. p. 52, l. 22-p. 53, l. 6.) Petitioner acknowledged that during the plea no one mentioned sixty-five percent, and he claims he did not raise the issue to the judge because "it weren't [sic] really a promise, you know. I just took my lawyer's advice." (App. p. 53, ll. 12-17.) Petitioner explained he realized the advice was wrong when he "got to Kirkland and they told me my max out date." (App. 54, ll. 22-25.) No testimony was provided as to Petitioner's current max out date at the time of the PCR hearing.

Plea counsel testified he represented Petitioner for a very short period of time. (App. p. 56, ll. 14-16.) He said they met once for a number of hours, reviewed discovery, and went over any issues Petitioner brought up. (App. p. 56, l. 19-p. 57, l. 2.) Counsel said he discussed the confidential informant and the potential of proceeding to trial with Petitioner. (App. p. 57, l. 20-p. 58, l. 8.) Following these discussions, Petitioner informed counsel he wanted to plead guilty. (Id.) Counsel stated he agreed with Petitioner's decision, and called the solicitor to ask for a plea deal at Petitioner's request. (Id.)

Concerning sentencing, counsel testified he explained to Petitioner that the negotiations were for five years. (App. p. 58, ll. 18-25.) Counsel did not recall telling Petitioner he would only serve sixty-five percent. (Id.) Counsel testified that **he does not tell clients the exact amount of time or number of days they will be required to serve on any given sentence** because such calculations are made by the Department of Corrections. (App. p. 58, l. 18-p. 59, l. 9.) Counsel said he thought Petitioner understood everything and that he did not try to rush the Petitioner into a guilty plea. (App. p. 59, l. 24-p. 60, l. 18.)

On cross-examination, counsel reemphasized that he told Petitioner the sentence was five years and told "him just like I tell anyone, you know, there's certain classifications with the prison system that once you get to wherever you're gonna be going, whether at Kirkland or Broad River or whatever, depending on certain things they can classify you into different areas that – that can make you eligible for 65 percent or 85 percent." (App. p. 64, ll. 1-7.) Counsel explained that he **did not recall the 65 percent issue being a major issue** for Petitioner. (App. p. 64, ll. 20-23.) Counsel said it was **after discussing the possibility of trial and the possible defenses and "after I explained what I thought would happen with those issues at trial that—that he decided he didn't want to go to trial and that he did want to go forward on**

the plea." (App. p. 64, l. 23-p. 65, l. 4.) Counsel said he thought the deal was a good offer, and that a trial would have exposed Petitioner to a greater sentence. (App. p. 64, ll. 10-19.) He further testified that Petitioner asked him to schedule a plea hearing. (Id.)

STATEMENT OF THE CASE

Petitioner is no longer confined in the South Carolina Department of Corrections. In November 2013, the Edgefield County Grand Jury indicted Petitioner for distribution of crack cocaine, second offense (2013-GS-19-0591). Andrew Farley, Esq., represented Petitioner. On February 9, 2015, Petitioner pleaded guilty as indicted. The Honorable R. Knox McMahon sentenced Petitioner to a term of five years imprisonment. Petitioner did not appeal his plea or sentence.

Petitioner filed his post-conviction relief (PCR) application on April 1, 2015. Respondent filed its Return on or about December 7, 2015. An evidentiary hearing into the matter was convened on December 9, 2015, at the Lexington County Courthouse. Petitioner was present at the hearing and was represented by Kristy Goldberg, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

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

I. The PCR Judge did not err in finding the guilty plea was not rendered involuntary where plea counsel advised Petitioner his parole eligibility would be between 65% and 85% of his sentence.

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Regarding allegations of ineffective assistance of counsel, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the petitioner must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117–18, 386 S.E.2d at 625.

An petitioner alleging his or her 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 petitioner. 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)). Unless a petitioner presents a valid reason for departing for the truth of his statements, the admissions he makes during a guilty plea should be considered conclusive. Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Normally, parole eligibility is a collateral consequence of sentencing that a defendant need not be specifically advised of before entering a guilty plea. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004). Additionally, the "85% Rule," which requires a defendant to serve 85% of sentence prior to being eligible for release, is also a collateral consequence of sentencing of which a defendant need not be informed. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000), overruled on other grounds by, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004). Even so, if a defendant is actively misinformed about parole eligibility, post-conviction relief is proper when the defendant establishes he relied on this information from counsel. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). Where there is no evidence contradicting or conflicting with a petitioner's testimony that he would not have pled guilty but for counsel's deficient performance, petitioner is entitled to relief. Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

On appeal, this Court must affirm the post-conviction relief judge's grant of post-conviction relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997)); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

In this case, the plea court ensured Petitioner understood he was facing a possible sentence of up to thirty years, that he had been made no promises aside from what had been stated on the record, and that he understood the advice he had received from plea counsel. (App. pp. 6-10.) At the PCR hearing, plea counsel testified he did not advise Petitioner about his parole eligibility except to say that he would be released sometime between serving sixty-five to eighty-five percent of his sentence. (App. p. 58, ll. 18-25; p. 64, ll. 1-7.) Plea counsel also testified that he did not recall the 65 percent issue being a major issue. (App. p. 64, l. 20 – p. 65, l. 4.) In fact, plea counsel testified that it was after explaining the trial and the potential defenses and advising Petitioner about what plea counsel "thought would happen with those issues at trial that—that he decided he didn't want to go to trial and that he did want to go forward on the plea." (App. p. 64, l.23-p. 65, l. 4.) Petitioner testified that had he known how he would be classified, he would not have pleaded guilty. The PCR Court, however, **after observing and hearing the testimony of the witnesses in the hearing**, made a specific finding that Petitioner had failed to meet his burden. Relying on the thorough colloquy in Petitioner's guilty plea and the conflicting testimony between Petitioner and plea counsel, the PCR Court held "**[Petitioner]'s testimony**

that counsel told him he would only have to serve sixty-five (65) percent of his sentence **is not credible**." (App. p. 83 (emphasis added).)

Further, there is no indication in the record that this statement was incorrect or that Petitioner served over eighty-five percent of this sentence. In 2010, the General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act. 2010 S.C. Acts No. 273. Prior to the act, second-offense distribution of cocaine base was a Class A felony. S.C. Code Ann. § 16-1-90(A) (Supp. 2001). As such, sentences for this crime were not eligible for parole and required service of eighty-five percent (85%) of the sentence before being eligible for release. S.C. Code Ann. §§ 24-13-100, -150(a) (Supp. 2000). In revising the law, the General Assembly added a provision in the distribution statute that provided:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code Ann. § 44-53-375(B) (Supp. 2012).

Based on a challenge by an inmate that went through the Administrative Law Court (ALC), the Court of Appeals in Bolin v. S.C. Dep't of Corrections, 415 S.C. 276, 781 S.E.2d 914 (Ct. App. 2015), analyzed the new provisions of this statute. In Bolin, the DOC argued that despite the amended language in section 44-53-375(B) making a person eligible for parole, it was still interpreting the offense as no-parole unless the inmate was granted parole. Bolin, 415 S.C. at 283, 781 S.E.2d at 917. Finding that the plain language of the statute made it "unreasonable" to characterize these parole eligible offenses as non-parole offenses and relying on the "expressly stated" legislative intent to find that the DOC "ignore[d] the purpose of the Act," the Court of Appeals reversed the ALC and held that a "second offense under § 44-53-

375(B) was no longer a no-parole offense." Bolin, 415 S.C. at 284–86, 781 S.E.2d at 918–19 (emphasis added).

The PCR Court made a credibility finding that Petitioner **had not been told** he would only have to serve sixty-five percent of his sentence. Testimony by plea counsel supports that Petitioner was not promised he would only have to serve sixty-five percent of his sentence. The PCR Court was correct in finding plea counsel was not ineffective.

Furthermore, there was no indication of what Petitioner's sentence was after Bolin, a decision issued prior to Petitioner's PCR hearing. More importantly, plea counsel testified the sixty-five percent issue was not what led Petitioner to decide to plead guilty. Petitioner was caught making a drug sale to a confidential informant. He discussed the issues in his case, his possible defenses, and his chances at trial with his attorney, and only after discussing those issues did he decide to enter a plea of guilty. His plea colloquy with the plea judge supports that conclusion. Therefore, the PCR court committed no error.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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27 Jan., 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO EDGEFIELD COUNTY
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The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2016-000243
Lower Court Case No. 2015-CP-19-00103

TOMMIE LEON PIXLEY,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

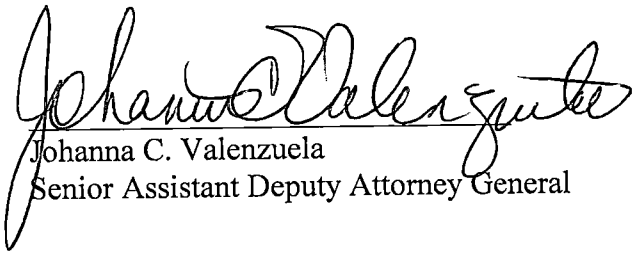
RESPONDENT.

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:

Kathrine H. Hudgins, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 27th day of January, 2017



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