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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Hon. J.C. Nicholson Jr., Circuit Court Judge

Lower Case No. 2013-CP-08-0385

Appellate Case No. 2015-001118

Greg Taylor,

Petitioner,

v.

State of South Carolina

Respondent.

BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court judge commit error by holding that the Petitioner's plea counsel was not ineffective for failing to advise the Petitioner of the immigration consequences associated with pleading guilty?

- II. Did the circuit court judge commit error by holding that any deficiencies by plea counsel were cured by the plea judge's colloquy with the Petitioner at the plea hearing where the judge advised the Petitioner that the plea deal could affect his right to remain in the country ?

STATEMENT OF THE CASE

On March 21, 2012, the Petitioner was indicted for possession of Marijuana with intent to distribute in violation of S.C. Code § 44-53-370(b)(2). On December 17, 2012, the Petitioner pled guilty to a first offense for possession of marijuana of more than one ounce under S.C. Code 44-53-370(d)(2).

As a result of his conviction for possession of marijuana, the Department of Homeland Security initiated removal proceedings in immigration court against the Petitioner on January 9, 2013. On February 13, 2013 the Petitioner filed an application for post conviction relief in the Court of Common Pleas in Berkeley County South Carolina. The application alleged that the Petitioner's plea counsel was ineffective because he informed the Petitioner that by pleading guilty, the Petitioner would not have any immigration consequences in his case. On May 17, 2013, the Petitioner was ordered removed back to Jamaica by an immigration judge in Lumpkin, Georgia. As a result, the Petitioner was unable to attend his post-conviction relief hearing that was held on December 11, 2014.

At the post conviction relief hearing, counsel for the Petitioner presented as evidence a sworn affidavit from the Petitioner attesting to the fact that his plea counsel had told him that his guilty plea would not have an effect on his ability to adjust status in the United States. The Petitioner's trial attorney presented testimony in his own defense concerning the adequacy of the representation. On April 24, 2015, the circuit court judge filed an Order of Dismissal denying the Petitioner's application for post-conviction relief. The order held that the Petitioner had not established that any constitutional violations had occurred and that the plea counsel's representation was not deficient. It also held that even if the plea counsel's representation was

deficient, that the issue was cured by the plea judge's colloquy with the Petitioner, concerning his potential ability to remain in the United States if he accepted the plea deal. The Order of Dismissal was served on counsel for the Petitioner on April 29, 2015. This Petition for Writ of Certiorari was filed on behalf of the Petitioner challenging the denial of the post conviction relief application on two grounds on June 30, 2015. The respondent filed a Return to Petition for Writ of Certiorari on December 2, 2015. The Writ of Certiorari was granted on October 20, 2016. An extension request for filing the brief was granted for counsel for the petitioner until February 21, 2017.

ARGUMENT

I. THE CIRCUIT COURT JUDGE COMMITTED ERROR BY HOLDING THAT THE PETITIONER'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ADVISE THE PETITIONER OF THE IMMIGRATION CONSEQUENCES ASSOCIATED WITH PLEADING GUILTY?

On February 13, 2013, the Petitioner filed an application for post-conviction relief asserting that his criminal defense attorney did not properly advise him as to the immigration consequences of pleading guilty to a possession of marijuana charge. The sworn affidavit of the Petitioner contains statements alleging that his trial attorney told him that a guilty plea would not affect his application to attain lawful status in the country and that the only thing that he may have to do is six months probation. The application for post conviction relief was submitted on the basis that the trial attorney had not met his obligations to his client under the standards set forth in the United States Supreme Court ruling in Padilla v. Kentucky. See generally Padilla v. Kentucky, 130 S.Ct. 1473 (2010).

Ineffective assistance of counsel claims are adjudicated under the two part standard set forth in Strickland v. Washington. See Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a determination is first made as to whether counsel's representation of a defendant "fell below an objective standard of reasonableness." Id. at 688. If the representation was found to have fallen below the "objective standard of reasonableness" requirement, the court must ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The South Carolina Supreme Court has defined reasonable probability as a probability which is sufficient

enough as to undermine the confidence in the outcome of the trial. See Johnson v. State, 325 S.C. 182 (1997). In the plea bargain context, a post conviction relief applicant must prove that, but for their counsel's unprofessional errors, there is a reasonable probability that they would not have pled guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). When a defendant pleads guilty on the advice of counsel, the plea must be attacked through a claim of ineffective assistance of counsel. See Roscoe v. State, 345 S.C. 16, 20 (2002). The South Carolina Supreme Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. See Webb v. State, 281 S.C. 237 (1984). Likewise, the Court will reverse the PCR court's decision when it is controlled by an error of law. See Pierce v. State, 338 S.C. 139 (2000).

The watershed case Padilla v. Kentucky applied the standard set forth in Strickland to the immigration context by demarcating the accepted minimum standard of professional conduct for criminal defense attorneys when representing clients without any legal status in the United States. See generally Padilla v. Kentucky, 130 S.Ct. 1473 (2010). In Padilla, plea counsel informed his client that his conviction, pertaining to narcotics possession, would not result in his removal from the country. Id. at 1483. The Court found that counsel's advice was clearly erroneous because a reading of the text of the deportation statute would have revealed that deportation was presumptively mandatory for controlled substance convictions. Id. Additionally, the Court held that when deportation consequences are truly clear, "the duty to give correct advice is equally clear." Id. However, the Court did hold that when "the deportation consequences of a particular plea are unclear or uncertain... a criminal

defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* This holding recognized the harsh consequences of immigration proceedings and the fact that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Id.* (citing INS. v. St. Cyr, 533 U.S. 289, 323 (2001)).

In the present case, the Petitioner’s plea attorney was questioned extensively, at the December 11, 2014 P.C.R. hearing, regarding his discussions with the Petitioner about the immigration consequences of his plea. When the Petitioner’s plea attorney was asked if he “at any point...did you talk with him about his immigration status”, plea counsel responded “to be honest with you his immigration status is nil in reference to his freedom.” Transcript of Record, PCR Hearing, p.12 (Dec. 11, 2014). Later, plea counsel was asked again if he had talked with the Petitioner about his immigration status and replied that “[m]y mental process freedom and the context of the case that is confronted to me is overriding than any immigration concern.” *Id.* Additionally, when asked if he had read the Padilla v. Kentucky case, plea counsel stated “no sir, I don’t recall reading that” and admitted to not reviewing the immigration removal statute because “it wouldn’t have mattered in reference to the defense of his case.” *Id.* at 14.

In Padilla v. Kentucky, Justice Stevens wrote that:

The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Padilla, 130 S.Ct. at 1480. Applied to the present case, it is understood that plea counsel had an immensely important obligation to his client to thoroughly discuss his immigration status and the fact that taking the plea deal would make him permanently inadmissible to the United States. There are two standards of conduct set forth in Padilla concerning the professional responsibilities of criminal attorneys who represent aliens. See Padilla, 130 S.Ct. at 1483. The first requires that attorneys give “correct advice” when the immigration consequences of a plea are “truly clear.” See id. Alternatively, when the immigration consequences of a particular plea are “unclear or uncertain”, an attorney is only required to advise the client that there is a “risk of adverse immigration consequences.” Id.

The Petitioner has stated in his affidavit that he would not have entered a guilty plea had his attorney not told him he had no immigration issues to be concerned about. See Sworn Affidavit of Greg Taylor, Appendix, P.35. This is supported by the fact that the Petitioner had a pending application to adjust his status to that of a permanent resident through his United States Citizen wife. See Appendix P. 35. The Petitioner was never told by his attorney that he would not be able to adjust status under his pending visa petition nor that he would be permanently inadmissible to the United States by accepting the guilty plea. See id. Additionally, the Petitioner’s plea counsel incorrectly informed him that the immigration authorities could not use his guilty plea against him because he had a visa petition pending. See id.

Under the Immigration and Nationality Act (“the Act”), persons who are classified as immediate relatives of United States Citizens are not subject to

numerical limitations on the issuance of immigrant visas. See INA § 201 (b)-(b)(2)(A)(i) (spouses of United States Citizens are considered to be immediate relatives). A consular officer may issue an immigrant visa to an immediate relative upon satisfactory proof that the applicant is entitled to immediate relative status. See INA § 224. However, aliens who have been convicted of a violation of “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance,” are inadmissible. INA § 212(a)(2)(A)(i)(II). Inadmissibility under this section of the Act may be waived at the discretion of the attorney general if the inadmissibility relates to a “single offense of simple possession of 30 grams or less of marijuana.” INA § 212(h).

In the present case, the immigration statute is clear that persons who have been convicted of a controlled substance violation are inadmissible to the United States. See INA § 212(a)(2)(A)(i)(II). Likewise, a waiver of this inadmissibility is not available to anyone who has been convicted of possessing 30 or more grams of marijuana. See INA § 212(h). The Petitioner is married to a United States Citizen and but for his inadmissibility arising from his controlled substance conviction could have been admitted into the United States as a permanent resident. Therefore, similar to the attorney in Padilla v. Kentucky, plea counsel in the present case had a duty to give correct legal advice concerning the immigration consequences of the plea deal that was offered to the defendant. When plea counsel was questioned if he reviewed the removability statute before entering the plea deal, he responded “to be quite honest with you it wouldn’t have mattered in reference to the defense of his case.” R. at 14. This statement shows a complete lack of concern for the Petitioner’s

immigration status. Without at least reviewing the applicable immigration statutes, plea counsel could not have possibly provided correct legal advice to his client concerning the immigration consequences of the plea.

In the Petitioner's affidavit, he states that if he had known that he would be facing deportation, he "would have not entered a guilty plea" and "would have gone to trial." Sworn Affidavit of Gregg Taylor Appendix P. 35. The Petitioner also states that his plea counsel told him not to be concerned about his immigration problems because his paperwork to adjust status was in process. *Id.* The Immigration and Nationality Act, however, is devoid of any form of a stay of deportation due to an applicant's paperwork being in process. The PCR judge held that "[c]ounsel testified the Applicant consulted with an immigration attorney and knew a lot about his status." PCR Order of Dismissal, p. 3. However, whether or not the Petitioner consulted with an immigration attorney is not reflected in the record. While the PCR judge in his order acknowledged the fact that plea counsel testified as to informing the Petitioner about the consequences of pleading guilty, this statement is in direct conflict with the numerous statements by plea counsel that highlighted a disinterest in the immigration consequences of the guilty plea. See PCR Order of Dismissal, p. 3; but see Transcript of Record, PCR Hearing, p.17 (Dec. 11, 2014) ("I have to make a decision about whether or not the state of South Carolina can prove its case. The fact that the consequences out there may be grave from an immigration standpoint really is of little use to me to be honest with you."); see also Transcript of Record, PCR Hearing, p.3 (Dec. 11, 2014) (When asked if he thought that in his profession that it would be clear that Mr. Taylor would be subject to deportation, plea counsel responded: "[s]ir

that would have been of small consequence to me in relationship to the facts of what he was charged with and my role as an attorney.”). The facts of the case and the testimony included in the record do not support the PCR judge’s finding that the Petitioner was properly advised of the immigration consequences of pleading guilty.

II. THE CIRCUIT COURT JUDGE COMMITTED ERROR BY HOLDING THAT ANY DEFICIENCIES BY PLEA COUNSEL WERE CURED BY THE PLEA JUDGE’S COLLOQUY WITH THE PETITIONER AT HIS PLEA HEARING

The South Carolina Supreme Court has held that inaccurate advice provided by an attorney can be “cured” by judicial colloquy during a plea hearing, if the information provided by the judge is accurate. See Wolfe v. State, 326 S.C. 158, 164-65 (1997) (a PCR applicant’s claim that his attorney erroneously promised him a reduced sentence if he plead guilty was cured by the plea judge’s colloquy that sentencing recommendations were not binding on him) (citing Richardson v. State, 310 S.C. 360 (1993) (grant of PCR, was inappropriate where after having heard incorrect information concerning guilty plea, applicant's impressions were corrected by accurate information)).

The Petitioner asserts that there exists a distinction between the decisions enumerated above and the present case. The key difference is that the prior South Carolina Supreme Court cases, holding that a plea judge “cured” any misconceptions created by an attorney, did not involve immigration consequences. Additional

requirements have been added to the plea bargaining process in the post Padilla legal landscape in cases where a non United States Citizen is involved. Padilla now requires that a defendant be given correct legal advice on how the plea will affect his immigration status when the immigration consequences of the plea are clear. See Padilla, 130 S.Ct. at 1483. Additionally, if the immigration consequences are unclear the defendant must be told that the plea carries a risk of adverse immigration consequences. See id. While Padilla involved an attorney's professional responsibility to correctly advise his client about immigration consequences, the same standard should be applied to determine whether a plea judge "cured" any deficiencies of counsel through his colloquy with the defendant. Applying this standard to an analysis of whether a deficiency was "cured" would coincide with the over arching principles behind the ruling in Padilla, which recognized the "seriousness of deportation as a consequence of a criminal plea" and attempted to ensure that "no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'" Id. at 1486 (quoting McMann v. Richardson, 397 US 759, 771 (1970)).

To determine whether the plea judge "cured" the deficiencies of the plea counsel in the present case, an analysis must be done as to the minimum information the Petitioner should have received concerning the immigration consequences of his plea. In the admittedly complex realm of immigration law, it is a very basic tenet that any conviction regarding a controlled substance carries with it presumptively mandatory deportation as well as renders the immigrant permanently inadmissible. See Padilla at 1483; see also INA § 212(a)(2)(A)(i)(II). The only exception to this rule is that a

waiver of inadmissibility is available to persons who have a single conviction for possession of marijuana in an amount less than thirty grams. See INA § 212(h).

In the present case, the Petitioner pled guilty to possession of marijuana in excess of an ounce. See Transcript of Record, Berkeley County Court of Gen. Sess., p.2 (Dec. 17, 2012). A conviction of this nature rendered the Petitioner permanently inadmissible to the United States and unable to apply for a waiver of that inadmissibility. See INA § 212(a)(2)(A)(i)(II); see also INA § 212(h). The statutes are abundantly clear pertaining to the immigration consequences of convictions to possession of controlled substances and therefore the attorney in the present case had the responsibility to provide his client with accurate legal advice regarding those consequences. Padilla at 1483. Likewise, a judge should not be deemed to have “cured” this deficiency by counsel unless an accurate warning was provided by the plea judge. See Wolfe v. State, 326 S.C. 158, 164-65 (1997).

In the present case, the plea judge told the Petitioner that “what we’re doing today could affect your right to remain here.” See Transcript of Record, Berkeley County Court of Gen. Sess., p.5 (Dec. 17, 2012). This statement is vague and does not fully encompass the gravity of the immigration consequences of the plea as they relate to the Petitioner. As mentioned earlier, a conviction to the possession of a controlled substance translates into the mandatory deportation for nearly all non United States Citizens as well as permanent inadmissibility into the country. These consequences are especially harsh considering that the Petitioner had a pending application for permanent residence status and a potential pathway to citizenship on account of his marriage to a United States Citizen. The Petitioner asserts that a plea judge may not

“cure” the deficiencies of plea counsel in these types of cases unless correct information is provided to the defendant so that they are able to understand the full consequences of the plea especially when they are clearly provided by statute.

CONCLUSION

For the reasons stated, the Petitioner asks the Court to respectfully vacate the petitioner's conviction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on **February 8, 2017**, I served a copy of the Petitioner's Brief and Appendix upon the other parties by depositing copies in the U.S. mail, postage prepaid, addressed as follows to their attorneys:

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