STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

Appellate Case No. 2016-000241

Carlos D. Smith,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge err in finding Counsel was deficient in advising Respondent to plead guilty and there is no probative evidence to support the PCR judge's finding that Respondent established prejudice where he faced a sentence of ten to thirty years on a single charge and where he was exposed, in the aggregate, to a maximum 141 years of imprisonment if convicted of all charges?

STATEMENT OF THE CASE

Carlos D. Smith ("Respondent") is incarcerated with the South Carolina Department of Corrections pursuant to the orders of commitment of the Spartanburg County Clerk of Court. Respondent was indicted at the January 2013 term of the Spartanburg County Grand Jury for four (4) counts of distribution of crack cocaine, 3rd offense[1] (2012-GS-42-1993, -6353, -6354, and -6357) (App. pp. 91-98, pp. 111-18); distribution of crack cocaine within a half mile of a school[2] (2012-GS-42-6356) (App. pp. 87-90); possession of marijuana, 2nd offense (2012-GS-42-2490) (App. pp. 103-06); possession of Oxycodone, 3rd offense (2012-GS-42-6352) (App. pp. 107-10); contributing to the delinquency of a minor (2012-GS-42-2489) (App. pp. 99-102), and possession of a weapon by a person convicted of a violent crime (2012-GS-42-6355) (App. pp. 119-22). Timothy Ray, Esquire represented Respondent.

On October 8, 2013, Respondent pleaded guilty to all charges as indicted. The

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[1] (B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

(1) for a first offense, **must be sentenced to a term of imprisonment of not more than fifteen years**. . . .

(2) for a second offense or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender **must be imprisoned for not less than five years nor more than thirty years** . . . .

(3) for a third or subsequent offense or if the offender has been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender **must be imprisoned for not less than ten years nor more than thirty years**. . . .

S.C. Code Ann. § 44-53-375(B)(1)-(3)(2003 & Supp. 2013)(emphasis added). See also Douglas S. Strickler, South Carolina Criminal Offenses and Penalties 208 (2015) (noting that distribution of cocaine base is a "serious" offense pursuant to section 17-25-45(B)).

[2] "A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars, or **imprisoned not more than ten years**, or both." S.C. Code Ann. § 44-53-445(D)(1).

Honorable J. Mark Hayes II sentenced Respondent to concurrent terms of twelve (12) years imprisonment for each distribution of crack cocaine charges; five (5) years for possession of a firearm by a person convicted of a violent felony; one (1) year for possession of marijuana; three (3) years for contributing to the delinquency of a minor; five (5) years for the possession of oxycodone – third offense; and ten (10) years for the distribution of crack within a half mile of a school. Respondent did not appeal his conviction or sentence.

Thereafter, Respondent filed an application for post-conviction relief ("PCR"). A hearing was held on January 12, 2016, at the Spartanburg County Courthouse before the Honorable R. Ferrell Cothran, Jr. J. Brandt Rucker, Esquire, represented Respondent. Alicia A. Olive, Esquire, of the South Carolina Office of the Attorney General, appeared on behalf of the State. Respondent testified in his own behalf. Timothy Ray, Esquire, also testified. On June 24, 2016, Judge Cothran ("the PCR judge") issued an order granting Respondent's application for PCR. Thereafter, the State filed a Notice of Appeal with this Court.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant 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 v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the reviewing Court will reverse the PCR court where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

ARGUMENT

The PCR judge erred in finding Counsel was deficient in advising Respondent to plead guilty and there is no probative evidence to support the PCR judge's finding that Respondent established prejudice where he faced a sentence of ten to thirty years on a single charge and where he was exposed, in the aggregate, to a maximum 141 years of imprisonment if convicted of all charges.

The first charge arose from a controlled buy that took place on February 17, 2011. (App. p. 9). In that operation, an informant with the Spartanburg County Sheriff's Office was equipped with audio visual recording devices, and was provided funds. (App. p. 9). The informant used the funds to purchase 6.67 grams of crack cocaine from Respondent. (App. p. 9). On December 28, 2011, deputies responded to a noise complaint at an inn. (App. pp. 9-10). The deputies knocked on the door and a 17-year-old female answered the door and gave verbal permission to search. (App. p. 10). The search of the room and subsequently of Respondent yielded 6.05 grams of marijuana. (App. p. 10). On January 18, 2012, another controlled buy was carried out and the informant purchased .16 grams of crack cocaine from Respondent. (App. p. 10). This also took place within a half mile of a school. (App. p. 11). At the plea, the solicitor stated that was the case the State was prepared to try the case that week. (App. pp. 10-11). Two more controlled buys were carried out—one on August 27, 2012, yielding .14 grams of crack cocaine, and another on September 5, 2012, yielding .14 grams of crack cocaine. (App. pp. 11-12). Lastly, on October 4, 2012, deputies responded to the same residence for a home detention check, during which officers found a handgun, a bullet, drug paraphernalia, and Oxycodone. (App. p. 12).

Respondent agreed with these facts as presented to the plea judge at the plea. (App. p. 12). The plea judge informed Respondent he could sentence him from ten to thirty years on each of the four distribution of crack charges; up to ten years on the proximity charge, up to five years on the oxycodone charge; up to a year on the marijuana charge; up to five years on the firearm

charge, and up to three years on the delinquency of a minor charge. (App. pp. 12-15). Respondent admitted guilt as to all charges. (App. pp. 15-16). He also denied that he had been threatened or coerced to plead. (App. p. 7). He also averred that he was pleading freely and voluntarily. (App. p. 7).

At the PCR hearing, Respondent testified that he was scheduled to go forward with the trial on the day he pleaded guilty. (App. p. 44, lines 18-21). Respondent first said that he was served with a notice of life without parole. (App. p. 46). When he was asked if he believed the State was going to try him on all of the charges eventually and "try to get [him] life without parole," Respondent testified "Yeah, they told me if I took one to trial, I got to take all of them to trial." (App. p. 9). Respondent stated that "he said the only thing I had to do was get convicted of one of them." (App. p. 9). Respondent testified that but for his discussion with Counsel about the effect of the life without parole notice, he would not have entered the plea that day but would have "went on to trial." (App. p. 9, lines 18-22).

Counsel testified that he felt that if Respondent would have proceeded to trial, he would have most likely been convicted. (App. p. 61, lines 20-22). Counsel testified the State's evidence against Respondent consisted of several controlled buys that were the basis of the charges. (App. p. 61, lines 2-3). He stated:

> some of them were questionable, but when it comes down to it, they were going to have someone that went in and bought drugs and identified [him] as the one they bought the drugs from. Except that the case we were about to go to trial on, they had the informant that bought drugs, and then the narcotics officers were there watching, and they were going to identify [Respondent] as the one [who] sold the drugs.

(App. p. 61, lines 4-12). Counsel testified that the State did not actually serve the life notice. He stated it was the State's intent to serve a life notice if they went forward to trial. (App. p. 63, lines 9-12). Counsel testified that he may have mistakenly informed him about his eligibility for life

without parole. (App. pp. 66-67). However, when asked if that advice was a major influencing factor on Respondent to enter a guilty plea, Counsel testified "It was part of it." (App. p. 67, lines 5-10). He testified "the other part is that he was facing four different offenses that carried very large sentences, and we had the opportunity to consolidate those in front of the judge that I believe to be more lenient in his sentencing. And that's what occurred." (App. p. 67, lines 11-16). Counsel further testified "my advice to him even if there was no possibility of [life without parole], would have been to resolve those in front of that judge." (App. p. 68, lines 1-4). Counsel further testified that he might have been successful at trial with respect to one of the four distribution charges, but that in his experience, "you're going to have a tough time winning all the way through." (App. p. 68, lines 9-21). Lastly, when asked: "regardless of the [life without parole] issue, based on your experience and the facts of this case and the State's case, would it still have been [his] advice to [Respondent] to take the guilty plea," Counsel responded, "Absolutely." (App. p. 71).

Respondent argued at the evidentiary hearing that Counsel was incorrect in advising Respondent that he could have exposed himself to a life sentence pursuant to 17-25-45(B), also known as the "three strikes law," Counsel was correct, and the PCR judge erred in finding that Counsel gave deficient advice.

Respondent had the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). This two-part test requires proof that (1) Counsel's performance "fell below an objective standard of reasonableness," and that (2) "but for counsel's unprofessional errors," there is a reasonable probability that "the result of the proceeding would have been different." Id. at 687-88, 694. The

same test applies where the claim arises from the plea process. Hill v. Lockhart, 474 U.S. 52, 57 (1985). In the plea context, the second prong requires a showing that but for the error, the defendant would not have pleaded guilty, but would have insisted on going to trial. Id. at 59. "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984) (quoting Lambert v. State, 260 S.C. 617, 198 S.E.2d 118 (1973)).

Section 17-25-45(B) provides:

> (B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:
>
> (1) a serious offense;
>
> (2) a most serious offense; [or]
>
> . . .
>
> (4) any combination of the offenses listed in items (1), (2), and (3) above.

Section 17-25-45(C)(2) provides:

> (2) "Serious offense" means:
>
> (a) any offense which is *punishable by a maximum term of imprisonment for thirty years or more* which is not referenced in subsection (C)(1); [and]
>
> . . .
>
> (b) those felonies enumerated as follows:
>
> . . .
>
> 44-53-445(B)(1)&(2) Distribute, sell, manufacture, or possess with intent to distribute controlled substances within proximity of school.

Respondent was indicted for four counts of distribution of crack cocaine, third offense, each carrying a maximum term of imprisonment of thirty years. S.C. Code Ann. 44-53-

375(B)(3). He was also indicted for distribution of crack cocaine within a half-mile of a school, which is an offense that is specifically enumerated in section 17-25-45(C)(2). Respondent also had a previous conviction for assault and battery with intent to kill ("ABWIK").[3] (App. p. 16). Subsection 17-25-45(B)(4) provides that a person who has two or more prior convictions for a serious offense, a most serious offense, or a combination, must (at the discretion of the solicitor) be sentenced to life without parole upon the conviction of another a serious offense. S.C. Code Ann. 17-25-45(B)(1)-(4),(G). From a plain reading of the statute, it is clear that the offenses of distribution of crack cocaine, third offense, and distribution within a half-mile of a school are serious offenses within the meaning of 17-25-45(B) and (C). Additionally, ABWIK is specifically enumerated as a "most serious offense." S.C. Code Ann. § 17-25-45(C)(1). The solicitor stated to the plea judge that the State intended to try Respondent on the distribution and proximity charge first, and that trial had been scheduled to go forward the week of the plea. Accordingly, given that Respondent had a previous conviction for ABWIK, had Respondent proceeded to trial and been convicted of both the distribution of crack cocaine charge, and the distribution within a half-mile of a school charge, the State could have sought a sentence of life without parole pursuant to subsection 17-25-45(B)(4) on the remaining charges. See S.C. Code Ann. §§ 17-25-45(B)-(C).

The PCR judge found that Counsel "misinformed [Respondent] about the status of the law," specifically his eligibility for a sentence of life without parole. However, Petitioner submits that there is no evidence to support this conclusion. Counsel testified that the State had not actually served a notice of life without parole, but indicated it would seek life without parole if Respondent proceeded to trial. At the guilty plea hearing, Counsel noted that "these charges are

[3] The State does not dispute that though Respondent was convicted of two counts of ABWIK, it was considered a single occurrence.

strikes and they—he could have been struck out and received a life sentence if we would have gone forward with the trial. So that's part of his decision in going ahead and entering the plea." (App. p. 19, lines 10-14). Furthermore, Respondent never specifically testified that he was informed that he was going to get a sentence of life if he proceeded to the first trial. Rather, he testified that the State "told me if I took one to trial, I got to take all of them to trial." (App. p. 9. He also stated that "[Counsel] said the only thing I had to do was get convicted of one of them." (App. p. 9). As explained above, this advice was correct. Counsel accurately stated that the distributions were "strikes." Counsel's performance in advising Respondent that if he did not plead to all offenses at once, he would be faced with a potential sentence of life without parole was not below an objective standard of reasonableness in light to the language contained in the relevant statutes. Accordingly, Petitioner submits the PCR judge erred in finding that Counsel was deficient.

Regardless, even if this Court finds the PCR judge did not err in finding counsel was deficient for advising Respondent that he could be exposed to a sentence of life without parole if he chose to proceed to trial, there is no evidence to support the PCR judge's finding that such deficiency prejudiced Respondent.

To establish prejudice, Respondent was required to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52 (1985). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009) (quoting Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007)). The prejudice requirement arises from the conclusion that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the

judgement of a criminal proceeding if the error had no effect on the judgment. Hill v. Lockhart, 474 U.S. at 57 (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)).

At the plea, Counsel stated that "in entering this plea, obviously these, these charges are strikes and they—he could have been struck out and received a life sentence if we would [have] gone forward with the trial. So that's part of his decision in going ahead and entering the plea." (App. p. 19). The record shows that the State intended to try Respondent on the charges arising from the January 18, 2012, controlled buy. If Respondent had been convicted, his exposure on the distribution alone was a *minimum* sentence of ten years of imprisonment, but he could have received *up to thirty*. He was also facing up to ten years on the proximity charge, which he might have been ordered to serve consecutively in the judge's discretion. Furthermore, regardless of the outcome of the initial trial, Respondent would still have been subject to prosecution on *all remaining charges*, including the three remaining distribution charges, each of which occurred on separate dates and carried penalties of ten to thirty years imprisonment. In the aggregate, Respondent's exposure on all of the charges was one-hundred and forty-one years (141) of imprisonment.

Respondent had prior convictions for public disorderly conduct and simple possession of marijuana in 1998, two counts of simple possession of marijuana in 1999, possession of marijuana, second offense, possession of Alprazolam, two counts of possession of crack cocaine second offense, sale of a pistol, and two counts of assault and battery with intent to kill (ABWIK) in 2000. (App. p. 16). Lastly, he had a 2010 conviction for simple possession of marijuana and a possession with intent to distribute crack cocaine first offense for which he was on probation at the time of his plea. (App. p. 16).

Respondent's testimony that he would have proceeded to trial instead of pleading guilty but for Counsel's alleged erroneous advice was not sufficient evidence to establish prejudice. Respondent had the burden of proving his allegations in his PCR hearing. The PCR judge's order contained only a conclusory finding that Respondent proved prejudice. (App. p. 84). This Court has found sufficient, *where undisputed*, an applicant's statement that but for the deficiency, he would not have pleaded guilty but would have insisted on going to trial. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485 (1991) (finding applicant met his burden where the *only* evidence in the record was applicant's own testimony that he would not have pled guilty but for counsel's erroneous advice). Cf. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (finding applicant did not satisfy his burden of proof even though the PCR judge had no plea transcript to review and the State did not present counsel's testimony where the applicant only alleged in his application he would not have pleaded guilty but did not testify to that effect). Respondent testified that but for the alleged deficiency of Counsel, he would not have pleaded guilty, but would have insisted on going to trial. Counsel stated that the possibility of an eventual life without parole sentence was only part of Respondent's decision to plead. He stated that the other part was that he was facing significant time—up to thirty years—on each of the charges, and that by pleading in front of that particular judge, he would get leniency. (App. p. 67). Counsel stated that regardless of the fact he might have misunderstood Respondent's eligibility for life without parole, *he would still have "absolutely" advised Respondent to plead guilty.*

Regardless of the accuracy of counsel's advice concerning life without parole eligibility, Respondent was facing an aggregate of 141 years in prison. Respondent had a lengthy record, including a conviction for a most serious crime. By resolving his case with a plea, Respondent received a sentence of twelve years on *all* charges. Thus, Respondent received a significant

benefit by pleading guilty in that he avoided exposing himself to multiple trials and an aggregate sentence of 141 years. Therefore, Respondent's self-serving testimony was not sufficient evident to establish a reasonable probability that but for the alleged erroneous advice of counsel, he would not have pleaded guilty, but would have insisted on going to trial. Given his exposure and Counsel's testimony that Respondent would most likely have bene convicted if he had gone to trial that week, it is unlikely Respondent would have chosen to proceed to trial. Accordingly, there is no evidence supporting the PCR judge's finding that Respondent established his burden of proving prejudice.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous finding of error and prejudice.

Respectfully submitted,

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February 17, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing two (2) copies of the Petition and one (1) copy of the Appendix in the United States mail, postage prepaid:

Robert M. Dudek, Esquire
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This 17th day of February, 2017.

Ashley Hawort

ASHLEY HAWORTH
PARALEGAL