

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

2014-CP-23-5711
Appellate Case No. 2016-000260

RECEIVED

MAR 10 2017

S.C. SUPREME COURT

Alejandro Licon Jimenez,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTIONS PRESENTED

Did the PCR judge err by finding counsel provided effective representation in challenging the State's enhancement of a drug charge to a second offense based on a prior Texas conviction and whether Petitioner's plea was freely, voluntarily and knowing entered as a second offense after being informed by counsel.

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. Petitioner was indicted at the July 2013 term of the Greenville County Grand Jury for trafficking cocaine (2013-GS-23-0873). He was represented by Lawrence W. Crane, Esquire.

On February 6, 2014, Petitioner pled guilty to trafficking cocaine (28-100 grams), second offense. The Honorable Steven H. John sentenced Petitioner to ten years imprisonment. Petitioner did not file an appeal.

Petitioner filed a PCR application on October 15, 2014 (2014-CP-23-5711), alleging he was being held in custody unlawfully. An evidentiary hearing was convened on October 20, 2015. Petitioner was represented by Scott D. Robinson, Esquire.¹ Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Honorable Perry H. Gravely denied and dismissed the PCR application by order filed December 9, 2015.

Petitioner filed a notice of appeal. His attorney submitted a notice of appeal to the South Carolina Court of Appeals on February 8, 2016. The South Carolina Court of Appeals ordered the case transferred to the Supreme Court of South Carolina pursuant to Rule 204(a) of the South Carolina Appellate Court Rules on February 17, 2016. Petitioner was granted a substitution of counsel on April 28, 2016 by the South Carolina Supreme Court. His attorney submitted a petition for writ of certiorari and appendix on November 7, 2016. This return follows.

¹ A Spanish language interpreter was also present.

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

The PCR judge did not err in finding that Counsel provided effective representation in challenging the State's enhancement of a drug charge to a second offense based on a prior Texas conviction and that Petitioner's plea was freely, voluntarily and knowing entered into.

A.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant 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. When there has been a guilty plea, the applicant must prove that

counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted).

B.

Petitioner asserts that Counsel was ineffective in his representation of Petitioner in failing to establish whether Petitioner had a previous conviction. Additionally, Petitioner asserts that his plea was not freely, voluntarily and knowing entered into. During the plea process, Petitioner was asked by the plea judge if it was correct that he was pleading guilty to a second offense and Petitioner responded in the affirmative. (App.p.63.LL.2-6). Moreover, the plea judge asked the Petitioner if he understood that the matter was a negotiated sentence that had been discussed between himself, his Counsel and the State and his response was in the affirmative. (App.p.63. LL.17-22). Furthermore, the Solicitor noted that during the reading of the facts for the guilty plea that Petitioner was found to have 287.03 grams of cocaine in his possession. (App.p.68 LL.22-25). The plea judge found there was a substantial basis factual basis for the plea and sentenced Petitioner.

C.

At the PCR hearing, Petitioner made the allegation that Counsel "should have done a better investigation in Texas and understood that the case that I had in Texas was a misdemeanor and that I shouldn't have been counted for a second offense" and also that he would not have plead guilty if he if was indeed pleading guilty to a second offense. (App.p.32-34). The PCR judge denied Petitioner's application for post-conviction relief finding that he "failed to meet his

burden of proving plea Counsel should have investigated his case and ensured he pled guilty to a first offense.” (App.p.5). Additionally, the PCR judge ruled in his order the plea judge conducted a thorough plea colloquy with Petitioner in which Petitioner admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (App.p.4). The PCR judge also found that Petitioner also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with Counsel, and had not been coerced in any way in addition to acknowledging he understood the judge's questions and had given truthful answer. (App.p.4)

D

The PCR judge did not err in its ruling that Petitioner failed to meet his burden entitling him to post-conviction relief. As previously stated, for an Applicant to be successful in a post-conviction action where he alleges ineffective assistance of counsel, he must first prove that his counsel was deficient. More specifically, counsel’s performance must be unreasonable under professional norms. Here, Petitioner plead guilty to trafficking cocaine (28-100 grams), second offense. (App.p. 18).

Under S.C. Code Ann. §44-53-470, an offense is considered a second or subsequent offense if:

(3) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs;

Petitioner testified that he pled guilty to a misdemeanor charge for drugs in Texas. (App.p.31 LL.13-14). Furthermore, a plain reading of the statute does not mention that a misdemeanor does not count towards a conviction, only that the offender be convicted of a first violation of a controlled substance of this state or any other. Counsel also testified he had

received the Applicant's NCIC report and testified he was satisfied Petitioner had a prior offense that justified the enhancement of the current charge to a second offense. (App.p. 4-5). As such, Petitioner cannot demonstrate Counsel was ineffective in failing to challenge the State's enhancement of a drug charge.

Additionally, Petitioner's plea was freely, voluntarily and knowingly entered into. As previously stated during the plea, Petitioner admitted to the judge he was guilty and the facts recited by the solicitor were true. (App.p.4). Petitioner also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with Counsel, and had not been coerced in any way. (App.p.4). The Applicant acknowledged he understood the judge's questions and had given truthful answers. (App.p.4). Because of this the court correctly found that Petitioner's plea was freely, voluntarily and knowing entered into.

Moreover, even if Petitioner is able to demonstrate that Counsel's performance was deficient, he fails to establish Counsel's deficient performance prejudiced him. As discussed previously, Petitioner was found to have 287.03 grams of cocaine in his possession which carries a mandatory sentence of 25 years. Counsel testified that a first or second offense in this case would not have mattered because of the weight of the drugs involved. (App.p.4). Moreover, Petitioner acknowledged that based on the amount of the drugs found in this case initially, he would be facing a mandatory sentence of twenty-five years and would face the same penalty if granted a new trial. (App.p.28.LL.11-14). Furthermore, Petitioner offered no evidence at the PCR evidentiary hearing that would support his claim that his prior conviction does not qualify his new charge for an enhancement. (App.p.5). In issuing its ruling, the PCR Court noted that it "cannot speculate as to whether further investigation by plea counsel would have resulted in a different outcome in this case." (App.p.5). See Jackson v. State. 329 S.C 345,495 S.E.2d 768

(1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Skeen v. State. 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Accordingly, there is probative evidence to support the PCR Court's ruling.

[Signature follows]

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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By: 
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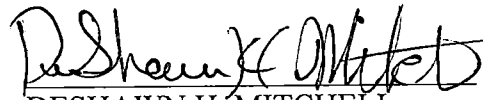
State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Respondent by depositing a copy of the same in United States mail, postage prepaid, addressed to:

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served. This 10th day of March, 2017.



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