

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Berkeley County

S.C. SUPREME COURT

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2015-001118

GREGG TAYLOR,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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PETITIONER'S 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?
2. 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

Petitioner was indicted at the March 2012 term of the Berkeley County Grand Jury for possession with intent to distribute marijuana (2012-GS-08-0363). Petitioner was represented by Steve C. Davis, Esquire. On December 17, 2012, Petitioner pled guilty to the lesser offense of possession of marijuana less than one ounce- first offense. Petitioner was sentenced by the Honorable R. Markley Dennis to confinement for a period of six months, provided upon the payment of \$750 fine, the balance is suspended to one year probation. Petitioner did not appeal his conviction or sentence.

On February 13, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about February 7, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on December 11, 2014, in Charleston County before the Honorable J.C. Nicholson, Jr. Mark Devine, Esquire, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented Respondent. Petitioner's plea counsel testified at the hearing. In lieu of Petitioner's live testimony, counsel for Petitioner submitted a "Sworn Affidavit of Gregg Taylor" as an exhibit. By an Order of Dismissal signed April 20, 2015, and filed April 24, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice.

The Petition for Writ of Certiorari was filed on behalf of the Petitioner on June 30, 2015. The Return to Petition for Writ of Certiorari was filed on December 2, 2015. The Writ of Certiorari was granted on October 20, 2016. The Brief of Petitioner was filed on February 8, 2017.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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 post-conviction relief 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

Petitioner argues that the PCR Court erred in failing to find Petitioner's plea counsel (hereinafter "Counsel") ineffective where Counsel allegedly failed to advise Petitioner of the immigration consequences associated with pleading guilty. Petitioner further argues that the PCR Court erred by holding that any deficiencies by Counsel were cured by the plea judge's colloquy with Petitioner at the plea hearing. For the following reasons, Respondent contends that these arguments are without merit.

I. Petitioner's plea counsel properly informed Petitioner of the immigration consequences to pleading guilty.

In Padilla v. Kentucky, the United States Supreme Court created a cause of action for ineffective assistance of counsel based on counsel's affirmative misadvice regarding immigration consequences and counsel's silence regarding immigration consequences. See Padilla v. Kentucky, 559 U.S. 356, 369-74, 130 S. Ct. 1473, 1484-86 (2010). The Supreme Court held that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation. Id., 559 U.S. at 360, 130 S. Ct. at 1478, 176 L. Ed. 2d 284 (2010). Additionally, Padilla held that "counsel must inform the defendant whether his plea carries a risk of deportation because it is a critical factor the defendant is likely to consider in deciding whether to enter a plea or proceed to trial." Hamm v. State, 403 S.C. 461, 464, 744 S.E.2d 503, 504 (2013) (citing Padilla, 130 S. Ct. at 1484-1486).

Petitioner argues that Counsel was ineffective for failing to properly advise Petitioner of the specific immigration consequences associated with pleading guilty. Respondent submits that the PCR Court correctly found that Petitioner was fully aware of the effect a guilty plea could have on his immigration status because Counsel and the plea judge properly advised Petitioner of these immigration consequences of his plea.

At the guilty plea, the plea judge asked Counsel and Petitioner the following:

THE COURT: Have you discussed the matter fully with your client?

COUNSEL: I have. Your Honor.

THE COURT: He's been advised of his rights and the consequences of the plea?

COUNSEL: He has.

THE COURT: Mr. Taylor, is that true, sir?

PETITIONER: Yes, sir.

App. 46, ll. 12-16.

During mitigation, Counsel brought up the issue of advising Petitioner of the effect of a plea on his immigration status, stating to the court:

We would have some grave concerns because I just came out of post-conviction relief in reference to people who have the status of whether or not we advised them competent to enough to affect their immigration status, but having said that, Your Honor, he stands before you prepared to accept responsibility.

App. 48, ll. 2-7.

After Counsel finished mitigation, the plea court began a colloquy with Petitioner, ensuring that he understood the immigration consequences of pleading guilty. The court stated:

THE COURT: It's nice to have a resident expert, someone who's here with a green card, but we've talked about it. It doesn't matter whether you're legal or illegal. If you commit a crime, you're subject to being removed from this country. Do you understand that, Mr. Taylor?

PETITIONER: Yes, sir.

THE COURT: So what we're doing today could affect your right to remain here. Do you understand that?

PETITIONER: Yes, sir.

THE COURT: Still want to go forward with the plea?

PETITIONER: Yes, sir.

THE COURT: Okay. Are you sure?

PETITIONER: Yes, sir.

App. 48, ll. 21-25 – 49, ll. 1-11.

At the PCR hearing, Petitioner provided the PCR Court with an affidavit since he had been deported to Jamaica. In this affidavit, Petitioner stated that Counsel did not advise him of the consequences of his immigration status as to his guilty plea, explaining that Counsel informed him that he had nothing to worry about and that he would be a free man. App. 35. Petitioner also stated that he would not have pled guilty if he had known that he would face deportation. App. 35.

Counsel testified at the PCR hearing that he did have a discussion with Petitioner about immigration because, as he told the plea court, he was in the middle of a post-conviction relief action dealing with advising a client on the immigration consequences of pleading guilty. App. 20, ll. 12-21. Counsel testified that he was aware that Petitioner was not an American citizen and even consulted with immigration lawyers so he could educate himself about Petitioner's situation. App. 21, ll. 3-23. Counsel also testified that prior to the plea, Petitioner "knew a lot about his status and he knew what the consequences were." App. 21, 18-19.

Petitioner's PCR Counsel asked Counsel:

Q. But I'm asking you [Counsel] did you advise him that he may be deported?

A. That was one of the consequences, yes sir.

Q. Okay. You advised him of that?

A. Yes, sir.

App. 22, ll. 11-15.

When asked if he informed Petitioner that pleading guilty would have no consequences on immigration, Counsel testified "I have no recollection of ever telling this young man there would be no consequences." App. 27, ll. 19-20.

On cross-examination, Counsel reaffirmed that he and the plea court advised Petitioner that he faced deportation by pleading guilty and further testified that he had no issues communicating with Petitioner throughout the process. App. 30 l. 16 – p. 31 l. 4.

In the Order of Dismissal, the PCR Court found that Petitioner's affidavit was not credible and that Counsel's testimony at the hearing was credible. App. 5. The PCR Court further found that Petitioner was fully advised that he could face deportation as a result of pleading guilty. App. 5. The PCR Court also found that Counsel's advice to Petitioner regarding his facing deportation adequately complied with the U.S. Supreme Court's ruling in Padilla. App. 6. Lastly, the PCR Court found that any alleged deficiency was cured by the plea judge's colloquy with Petitioner, where he advised Petitioner that pleading guilty could subject him to being removed from the United States. App. 6.

Petitioner's argument is without merit. First, the PCR Court found Petitioner's affidavit to be not credible and found that Counsel provided credible testimony. This Court must give great deference to the PCR judge's determinations of witness credibility. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Additionally, Counsel provided credible testimony that he advised Petitioner of the immigration consequences of pleading guilty. Counsel testified that he has represented many non-citizens before and he provided credible testimony that he was so certain that he discussed the immigration consequences with Petitioner because Counsel was, at the time of the plea, dealing with the exact same issue of Padilla advice on post-conviction relief.

Petitioner has not provided any information to the contrary, aside from the affidavit deemed to be non-credible by the PCR Court. There is ample evidence of probative value

through Counsel's extensive, credible testimony to support the PCR Court's finding that Counsel adequately complied with Padilla by advising Petitioner that he could face deportation by pleading guilty.

II. Assuming *arguendo* that Counsel's advice was deficient, any deficiencies by plea counsel were cured by the plea judge's colloquy with Petitioner at the plea hearing.

Petitioner argues that the PCR Court erred in holding that any deficiencies by Counsel were cured by the plea judge's colloquy with Petitioner at the plea hearing. Respondent submits that this argument is without merit.

The PCR Court was correct in finding that Petitioner failed to prove any deficient performance by Counsel. Additionally, the PCR Court was also correct in finding that Petitioner could not prove the second prong of Strickland, that Petitioner was prejudiced by any alleged deficient performance. Assuming *arguendo* that Counsel did not advise Petitioner of the immigration consequences of his guilty plea, the plea court cured any deficiency by fully advising Petitioner of these rights during the plea hearing.

This Court, in Holden v. State, dealt with the issue of whether an applicant's plea counsel was ineffective for misadvising the applicant on a plea offer and the sentence range. After finding the plea counsel to be ineffective, this Court held the following (citing authorities which are also relevant to this case):

In view of this evidence, we conclude that any alleged deficiency in plea counsel's representation was cured by the plea colloquy. See Bennett v. State, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006) (reversing grant of PCR and stating that "even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range"); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (reversing grant of PCR and holding that even if plea counsel erroneously informed defendant that his sentence would only be three years, the information conveyed at the plea hearing cured any misconception caused by counsel's alleged inaccurate advice); Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (reversing grant of PCR on the ground that there was no evidence to support the PCR judge's

finding that applicant received ineffective assistance of counsel due to erroneous sentencing advice where "any misconception was cured at the plea hearing"); Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (reversing grant of PCR and recognizing that in considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing).

Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011).

After examining the plea judge's colloquy with Petitioner concerning the deportation consequences, the PCR Court correctly found that "it [was] clear from the record [Petitioner] was fully aware of the effect his guilty plea could have on his immigration status." App. 6. Even if Counsel was ineffective, no prejudice could have resulted because the plea court specifically went over the immigration consequences as a precaution, curing any alleged deficiency. After informing Petitioner of the immigration consequences, the plea court asked Petitioner if he understood. Petitioner responded affirmatively. App. 49, l. 6. The plea court next asked if Petitioner still wanted to go forward with the plea. Petitioner again responded affirmatively. App. 49, l. 9. Thus, there is certainly evidence of probative value to support the PCR Court's ruling that any deficiencies by plea counsel were cured by the plea judge's colloquy with Petitioner at his plea hearing. Although the plea judge's colloquy was brief, there is no standard inquiry a plea judge must undertake with a defendant, especially considering the colloquy was being examined by the PCR Court simply for the sake of argument as the PCR Court had already found that Counsel complied with Padilla and was not deficient. It is also important to note that the plea judge's curative advice was given in addition to Counsel's advice to Petitioner of the immigration consequences, which according to Counsel, Petitioner already knew prior to the plea. Accordingly, there is certainly probative evidence presented at to the PCR Court that Counsel advised Petitioner of the immigration consequences of pleading guilty and that the plea judge

cured any alleged deficiencies by advising Petitioner that he could be subject to deportation by pleading guilty.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

June 12, 2017

STATE OF SOUTH CAROLINA
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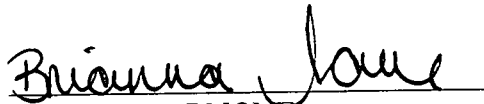
Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Mark J. Devine, Esquire
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This 12th day of June, 2017.


BRIANNA ARNONE
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