

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 21 2017

S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-002232

ORTAVIOUS R. MITCHELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
SC Bar # 101254

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT’S ISSUES PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW6

ARGUMENT8

**The PCR court properly advised Petitioner of the hazards of
being represented by plea counsel at the post-conviction relief
hearing8**

CONCLUSION.....14

RESPONDENT'S ISSUE PRESENTED

The PCR court properly advised Petitioner of the hazards of being represented by plea counsel at the post-conviction relief hearing.

STATEMENT OF THE CASE

Guilty Plea

Petitioner was indicted by the October 2011 term of the York County Grand Jury for trafficking in crack cocaine greater than 100 grams (2011-GS-46-3323) and possession of crack cocaine (2011-GS-46-3606). Reginald Lloyd, Esquire, represented him. On May 21, 2013, Petitioner appeared before the Honorable John C. Hayes, III, for a pre-trial motion to suppress the evidence. An evidentiary hearing was conducted during which exhibits were introduced and testimony was taken from Commander Marvin Brown, Investigator Lee Allen, Deputy Sharon Estep, Investigator Mike Ligon, and Investigator Jamie Faulkenberry. At the conclusion of the hearing, the court denied the motion to suppress. After jury selection, Petitioner elected to forego his jury trial and entered a guilty plea to the lesser-included offense of trafficking in crack cocaine, 28-100 grams, in exchange for a negotiated sentence of between ten and fifteen years and the dismissal of the possession of crack cocaine charge. Judge Hayes sentenced Petitioner to thirteen years' imprisonment. No direct appeal was taken.

Post-Conviction Relief Application

On May 22, 2014, Petitioner, through counsel Lloyd, filed an application for post-conviction relief with Mr. Lloyd, alleging a constitutional violation occurred when he was deprived of his right to a fair trial when the trial judge failed to suppress evidence that was seized in violation of Petitioner's Fourth Amendment right, and when the State proceeded with prosecution based upon an illegal profile which led to the search of the vehicle. Additionally, Petitioner contended that the State violated the Fourteenth Amendment to the United States Constitution through its pattern and practice of illegally impounding and conducting an inventory search on vehicles, which

Petitioner claims is apparent in this case.

The State filed its Return on September 24, 2014. An evidentiary hearing into the matter was convened on November 17, 2014, at the Moss Justice Center in York, South Carolina before the Honorable Alison R. Lee. Petitioner was present at the hearing and represented by Reginald Lloyd, Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office represented the State.

At the outset fo the hearing, Respondent requested the PCR court question Petitioner and Mr. Lloyd to clarify that Petitioner was not raising any claims of ineffective assistance of counsel and that Petitioner would waive such claims if he continued to be represented by Mr. Lloyd. At the hearing, Petitioner testified on his own behalf. Respondent made a motion for Summary Judgement under Rule 56(b), SCRCP, arguing although post-conviction relief is the proper forum to address due process claims, Respondent argued Petitioner's claim was a direct appeal issue and post-conviction relief is not a substitute for an appeal. In response, Petitioner's counsel Lloyd argued,

Ordinarily that would be true but when there has been an intervening constitutional clarification ruling by the Court directly applies to this particular petitioner, that that is an exception to the direct appeal issue and that petitioner is in fact able to raise that on PCR. Just to quote *Gibson v State*, [329 S.C. 37, 495 S.E.2d 426 (1998)] the Court stated that petitioner alleged in that case, constitutional violation of PCR, a violation found to be unconstitutional after a time for appeal lapses is not a direct appeal issue nor a PCR consideration.

App. 310, ll. 11-20.

Petitioner argued this Court's ruling in *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014), occurred subsequent to Petitioner's guilty plea and its holding would make the underlying search in Petitioner's case unconstitutional. App. 310, ll. 21-25.

By Order of Dismissal signed September 29, 2016 and filed October 3, 2016, the PCR court denied and dismissed Petitioner's application with prejudice. The PCR court clarified its

understanding of Petitioner's issue on PCR, finding Petitioner stated that he was not arguing ineffective assistance of counsel; rather, only a constitutional violation of Petitioner's rights when the trial judge denied Petitioner's motion to suppress the evidence found in the vehicle. App. 362. The PCR court further found Petitioner contended that post-conviction relief was the correct forum to address the trial court's ruling on Petitioner's motion to suppress based on a new constitutional principal announced in *State v. Adams* that occurred after Petitioner's guilty plea. App. 362. The PCR court dismissed Petitioner's claim, finding "[p]ost-conviction relief is not the proper forum for [Petitioner] in this case, to address the Trial Judge's ruling on his motion to suppress evidence." App. 363. The PCR court found *Adams* was not analogous to the facts of Petitioner's case and further found that *Adams* did not announce a "new rule" that could be applied retroactively on collateral review. App. 363-364.

Petitioner filed a timely notice of appeal and filed his Petition for Writ of Certiorari on dated July 3, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

"A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001). When an applicant is represented on post-conviction relief by his trial counsel, there is no waiver of the issue of ineffective assistance of counsel. *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987). Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred." *Id.* "[W]hen applicants appearing at hearings on post-conviction relief are represented by their trial counsel, the court shall examine the applicant concerning the waiver of the issue of ineffective assistance of counsel." *Id.* at 530, 362 S.E.2d at 22. "The court shall advise the applicant that the dual representation will result in the waiver of any claim of ineffective assistance of counsel." *Id.*

“The applicant shall then state on the record whether he wishes to proceed, thereby waiving the issue.” *Id.*

ARGUMENT

The PCR court properly advised Petitioner of the hazards of being represented by plea counsel at the post-conviction relief hearing.

Relevant Facts

Upon calling Petitioner's case for a PCR hearing, Respondent requested the PCR court confirm that Petitioner was waiving any claims of ineffective assistance counsel as it related to Mr. Lloyd due to his service as plea counsel and PCR counsel. App. 303, ll. 19-22. Mr. Lloyd informed the court that Petitioner's sole claim on PCR was that the Court's ruling in *State v. Adams* clarified a constitutional issue applicable to Petitioner's case. App. 304, ll. 9-16.

The PCR court then undertook the following colloquy:

THE COURT: And before we get that far, I think as I understand Mr. Johnson what you want me to clarify with Mr. Mitchell is that his Post-Conviction Relief application does not assert any claims of ineffective assistance of counsel, and as I understand the basis for the Post-Conviction Relief application it is arising out of after the motion to suppress was denied by the Court and the trial was prepared to go forward. Mr. Mitchell took advantage, I guess, of a plea offer that was extended to him that reduced the charges and therefore reduced the exposure to jail time. He decided to accept that offer and I read the plea portion as well. And so Mr. Lloyd I think during the sentencing made reference to the fact there is no conditional plea in South Carolina which means that by pleading guilty to the reduced charge that he would be giving up the opportunity to appeal any rulings that were made by the judge during the course of the motion to suppress. And so, as I understand Post-Conviction Relief applications they can assert other constitutional basis to seek relief in addition to ineffective assistance of counsel; is that correct?

MR. JOHNSON: Yes.

THE COURT: Is that your understanding?

MR. LLOYD: Yes, Your Honor, that is our understanding of the PCR statute.

THE COURT: Just to make sure, Mr. Mitchell, you heard the conversation that we have been having. Do you understand generally what we have been discussing so far?

MR. MITCHELL: Yes, ma'am.

THE COURT: And it is my understanding that Mr. Lloyd did represent you during the course of – in connection with these charges and represented you during the course of the motion to suppress and the trial that was to take place back in May of 2013, is that correct?

MR. MITCHELL: Yes, ma'am.

THE COURT: And you've asserted a claim of Post-Conviction Relief and actually it was signed by Mr. Lloyd so I believe he raised it on your behalf; is that correct?

MR. MITCHELL: Yes, ma'am.

THE COURT: And as I understand your application you were challenging the constitutional issues relating to the stop that do not affect Mr. Lloyd's – how he represented you and you are not making any claim that he did anything that was inappropriate or that waived your right or did anything in essence to cause you a deprivation of any of your liberties?

MR. MITCHELL: No, ma'am.

THE COURT: And do you understand that by coming here and having Mr. Lloyd represent you that you would still be giving up that opportunity to be able to in the event that you thought of something or somehow or another there was some other issue that may come to light during the course of the proceeding you're giving up that the opportunity by having him represent you at this particular point by raising that particular claim?

MR. MITCHELL: Yes.

THE COURT: All right.

MR. LLOYD: If I may I just wanted to let the Court know I did discuss that issue with Mr. Mitchell and I wanted to make sure that he understood the Court would colloquy on that issue and that he was free to in fact raise that even now if he felt like he needed to and that obviously we would address that with the Court if he needed separate counsel to counsel him on that.

THE COURT: And at this time Mr. Mitchell do you have any issues that you need to raise with respect to that?

Mr. Mitchell do you at this particular time have any issue that you wish to raise with respect to the matter in which Mr. Lloyd has

represented you in connection with these particular charges either pretrial, during the course of the trial, during the course of the hearing on the motion to suppress or at this particular point?

MR. MITCHELL: No, ma'am.

THE COURT: And do you wish to go forward today with Mr. Lloyd representing you as it relates to the claims that you raised in your application?

MR. MITCHELL: Yes, ma'am.

THE COURT: Is there any additional questions you wish to ask?

MR. JOHNSON: I just ask that he be sworn in just for the record.

THE COURT: Do you solemnly swear or affirm all the answers that you have giving to me have been the truth so help you God?

MR. MITCHELL: I do.

THE COURT: Thank you. Anything further? Any additional questions Mr. Lloyd that you feel need to be asked of him at this time?

MR. LLOYD: On that issue no, Your Honor.

App. 305, 1. 7 - 308, 1. 25. As stated above, Petitioner proceeded on the issue of whether the trial court's failure to suppress the drug evidence resulting from a traffic stop was deemed unconstitutional in light of *State v. Adams*.

Analysis

Petitioner knowingly and voluntarily waived his right to raise claims of ineffective assistance of counsel against Mr. Lloyd after the PCR court's extensive colloquy. As the Court held in *Carter*, the PCR court shall examine the applicant concerning the waiver of the issue of ineffective assistance of counsel when an applicant is represented at a PCR hearing by his trial counsel. *Carter*, 293 S.C. at 530, 362 S.E.2d at 22. It held this examination must specifically advise of the hazards of being represented by trial counsel at the post-conviction hearing. *Id.* 293 S.C. at 530, 362 S.E.2d at 21. This Court further held the PCR court shall advise the applicant that the dual representation will result in the waiver of any claim of ineffective assistance of

counsel. *Id.*

Here, the PCR court's examination of Petitioner sufficiently advised Petitioner that his PCR application only alleged constitutional issues and did not allege any claims of ineffective assistance against Mr. Lloyd. The PCR court properly informed Petitioner that by having Mr. Lloyd represent him at a PCR hearing, he would give up the opportunity to challenge Mr. Lloyd's representation and claim that his actions caused a deprivation of his liberties. App. 306, l. 24 - 307, l. 14. Furthermore, Mr. Lloyd informed the PCR court that he discussed this issue with Petitioner so that Petitioner understood he could have separate counsel to address claims against Mr. Lloyd. App. 307, ll. 17-23. The PCR court then specifically asked Petitioner if he wished to raise any issue related to Mr. Lloyd's representation "either pretrial, during the course of the trial, during the course of the hearing on the motion to suppress or at this particular point." App. 308, ll. 2-8. Petitioner responded that he did not have any issues and wished to go forward with Mr. Lloyd's representation. App. 308, ll. 9-13.

Overall, the PCR court satisfied this Court's standard set in *Carter* by advising Petitioner of the hazards of being represented by Mr. Lloyd by specifically telling him that he was waiving the opportunity to challenge Mr. Lloyd's actions and any deprivation of Petitioner's rights that resulted therefrom. This Court in *Brannon* held a PCR applicant's "knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Brannon* 345 S.C. at 439, 548 S.E.2d at 867. In Petitioner's case, the PCR judge held a colloquy with Petitioner and Mr. Lloyd at the same time, and Mr. Lloyd informed the court that he had already discussed the issue with Petitioner prior to the hearing. It is apparent from the testimony that the PCR court sufficiently satisfied its obligation to inform Petitioner, and

Petitioner's decision to proceed was made knowingly and voluntarily.

The PCR court had no duty to inform Petitioner that his PCR claim could be considered a direct appeal issue and therefore improper for PCR. Even though Respondent made a motion for summary judgment on those grounds, the PCR court decided to proceed with the hearing and hear testimony from Petitioner and arguments from Mr. Lloyd and Respondent. At the end of the hearing, the PCR court took the case under advisement and asked each side to submit briefs on the constitutional issues. It would be improper for the PCR court to give legal advice considering the nature and strength of Petitioner's claims, especially in light of the fact that the PCR court itself was not immediately convinced that the PCR allegation was improper when it declined to grant Respondent's motion for summary judgment. Regardless, the PCR court fulfilled its duty under *Brannon* and *Carter*, and any additional advice from the court concerning the nature of Petitioner's allegations would be improper.

Petitioner argues the PCR court should have informed him that by waiving claims of ineffective assistance of counsel, Petitioner was effectively waiving all claims he could validly pursue under the PCR Act. Although a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel, it would be impossible for Petitioner to have raised his constitutional claim as ineffective assistance of counsel. Petitioner's issue concerned whether *State v. Adams*, which had been decided after Petitioner's guilty plea, announced a new rule that would retroactively cause Petitioner's motion to suppress to be granted. His claim could not have been raised as ineffective assistance as he could not allege that Mr. Lloyd was ineffective for failing to argue the holding of a case that had not yet been decided or published at the time of the suppression hearing. The PCR court analyzed Petitioner's claim under *Gibson v. State*, which held an applicant may assert constitutional violations for claims based on a new

constitutional principle between the time of direct appeal and the petition for post-conviction relief. App. 363 (*citing Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998)). The PCR court denied Petitioner's application by holding that the constitutional issue was a direct appeal issue, but only after thorough analysis of whether *Adams* announced a new rule that should be applied retroactively on collateral review. Thus, it would be improper for the PCR court to prematurely inform Applicant at the outset of the hearing that his PCR claim was not cognizable, when the court had not yet heard testimony or argument, nor had the court done the proper analysis under *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007) and *Teague v. Lane*, 489 U.S. 288 (1994) to make such a decision. Again, the PCR court only made its decision after hearing testimony and argument, accepting legal briefs from both sides, and researching the issue as evident by the legal analysis in its thorough Order of Dismissal issued after being held under advisement for a lengthy period of time. As such advice to Petitioner would be premature and improper, the PCR court did not err by failing to inform Petitioner that his PCR claim was not cognizable under the PCR Act and thus he would be waiving all PCR issues by waiving ineffective assistance of counsel.

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, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

November 21, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2016-002232

RECEIVED
NOV 21 2017
S.C. SUPREME COURT

ORTAVIOUS R. MITCHELL,

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:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 21st day of November, 2017



CAROLINE COLLINS
LEGAL ASSISTANT