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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DILLON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002359

ANTHONY COOK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Was Petitioner's plea counsel ineffective for failing to object to indictment 2010-GS-17-469 to which Petitioner pled guilty and was sentenced to violent second-degree burglary instead of nonviolent second-degree burglary?

STATEMENT OF THE CASE

In June 2010, the Dillon County Grand Jury indicted Petitioner for grand larceny (2010-GS-17-465), and second-degree burglary, (2010-GS-17-468). In August 2013, the Dillon County Grand Jury indicted Petitioner for second-degree burglary (2010-GS-17-469), receiving stolen goods (2013-GS-17-597), and criminal conspiracy (2013-GS-17-600). On April 22, 2013, Petitioner appeared with Assistant Public Defender Nicholas Lewis before the Honorable Paul M. Burch for a status conference. At this status conference, Assistant Solicitor William Shipp Daniel, III, informed the court that the State had offered a plea deal for Petitioner to plead guilty to the above charges and other charges out of Marlboro County in exchange for a sentence of eight and a half years (classified as violent), or twelve years (classified as non-violent). App. 56, ll. 15-17. Solicitor Daniel informed the court that Petitioner rejected the plea offers and the State would make no other offers. App. 56, ll. 21-25.

On September 3, 2013, Petitioner appeared with Mr. Lewis before the Honorable R. Ferrell Cochran, Jr., and proceeded to a jury trial on the above charges. After jury selection, Assistant Solicitor Daniel put the State's last plea offer on the record. App. 37-39. Assistant Solicitor Daniel informed the court that the latest offer to Petitioner was for twelve years (classified as non-violent) to plead guilty to two second-degree burglary charges, grand larceny, failure to stop, conspiracy, and possession of stolen goods. App. 38, ll. 14-20. Assistant Solicitor Daniel notified the court that Petitioner had rejected the offer and no other offer would be extended to Petitioner.

On September 4, 2013, Petitioner appeared with his privately retained counsel, B. Scott Suggs, Esquire, and pled guilty to the above-listed charges as indicted. In exchange for the plea, the State dismissed at least nine other pending charges. Judge Cochran sentenced Petitioner to

twelve years for second-degree burglary (violent); eight years, concurrent, for second-degree burglary charge (non-violent); four years, concurrent, for criminal conspiracy; thirty days, concurrent, for receiving stolen goods; and two years, consecutive, for grand larceny. Petitioner did not appeal his plea or sentence.

Post-Conviction Relief Application

On May 21, 2014, Petitioner filed an application for post-conviction relief, alleging the following grounds for relief:

1. Involuntary and constitutionally invalid guilty plea
2. Ineffective assistance of counsel
3. Prosecutorial misconduct

App. 74-80.

On November 21, 2014, the State filed a return. On December 17, 2015, Petitioner filed a first amendment to the PCR application alleging the following grounds:

1. Counsel failed to communicate with and effectively represent Applicant.
2. Applicant denied opportunity to fully discuss plea offers with counsel.
3. Counsel failed to object to lack of factual basis for guilty plea.

App. 85.

On December 23, 2015, Petitioner filed a second amendment to the PCR application, alleging the following grounds:

1. Solicitor committed prosecutorial misconduct when he continually coerced Applicant to plead guilty through an attorney he knew wasn't Applicant's counsel.
2. Plea counsel failed to advise Applicant to withdraw his guilty plea.
3. Counsel failed to object to Applicant being sentenced as a violent offender rather than non-violent offender when indictment was for a non-violent offense.

App. 87.

On July 19, 2016, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Lance S. Boozer represented Petitioner at the PCR hearing. Assistant Attorney General Justin J. Hunter represented the State.

In a written order signed November 3, 2016, the PCR court denied relief and dismissed the application. The PCR court agreed with Mr. Suggs' testimony that the indictment may have been amended to reflect the violent provision because the corresponding sentencing sheet lists the violent subsection and Counsel, the assistant solicitor, and the plea judge explained in detail that Petitioner was pleading to the violent subsection and informed him of the consequences of such a plea. App. 191. The PCR court found Petitioner understood the offense to which he was pleading and being sentenced and never gave any indication during the plea hearing that the information being given to him was incorrect or that he did not understand the proceedings. App. 191.

A timely notice of intent to appeal was served on November 21, 2016. The Petition for Writ of Certiorari was submitted, dated January 20, 2017. This Return to the Petition for Writ of Certiorari follows.

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). In a PCR action, the petitioner bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner 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, supra*.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the petitioner must prove counsel’s performance was deficient. *Id.* Under this prong, the Court measures counsel’s performance by its “reasonableness under prevailing professional norms.” *Id.* (citing *Strickland*, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced the petitioner 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. With respect to guilty plea counsel,

the petitioner must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

ARGUMENT

The PCR court correctly found Petitioner's plea counsel was not ineffective for failing to object to indictment 2010-GS-17-469 to which Petitioner pled guilty and was sentenced to violent second-degree burglary instead of nonviolent second-degree burglary.

Mr. Suggs was not ineffective for failing to object to Petitioner being pleading guilty and being sentenced to violent second-degree burglary. It was well established throughout the course of Petitioner's case that he would be pleading guilty to the violent subsection of second-degree burglary for 2010-GS-17-469.

Status Conference and Plea

On April 22, 2013, a status conference was held before the Honorable Paul M. Burch while Petitioner was present and represented by Assistant Public Defender Nicholas Lewis. Assistant Solicitor Daniel put the State's plea offer on the record, which consisted of pleading to a litany of charges for which he faced up to seventy years and receiving eight and a half years of violent incarceration or twelve years nonviolent incarceration. App. 56, ll. 2-20. Petitioner rejected the offer. App. 56, ll. 21-22.

On September 4, 2013, Petitioner appeared with Mr. Suggs before the Honorable R. Ferrell Cothran to plead guilty. At the plea hearing, the assistant solicitor informed the court Petitioner was pleading guilty to five charges, including second-degree burglary (violent). App. 2, ll. 3-10. He informed the court a jury had already been picked and Petitioner was facing seventeen total charges. App. 2, ll. 17-18. The plea judge conducted the standard guilty plea colloquy, assuring Petitioner was knowingly waiving his constitutional rights and making sure he was pleading freely and voluntarily. App. 4-11. The plea judge informed Petitioner he was pleading guilty to second-degree burglary (violent) which carried up to fifteen years imprisonment and was classified as a violent and serious offense. App. 5, ll. 2-8. Petitioner

indicated he understood the judge's questions and information concerning the second-degree burglary (violent) plea. App. 5, ll. 5-8.

Assistant Solicitor Daniel informed the plea court Petitioner was facing fifteen years for the second-degree burglary (violent) charge and ten years for second-degree burglary (nonviolent). App. 13, ll. 7-8. When Mr. Suggs addressed the plea court, he also acknowledged "now we know that one of the burglaries he is pleading to or has pled to is under Subsection B, which is a violent section." App. 17, ll. 2-4. Mr. Suggs informed the plea court he explained the difference between the violent and nonviolent offenses. App. 17, l. 4 – 18, l. 16. Mr. Suggs asked the court to consider concurrent sentences "because one of these offenses is a burglary second under subsection B." App. 18, ll. 1-2. Petitioner was sentenced to imprisonment for twelve years for second-degree burglary (violent) and eight years for second-degree burglary (nonviolent) to run concurrently.

PCR Hearing

At the PCR hearing, Petitioner testified the factual basis for his guilty plea, as read during his plea hearing by the assistant solicitor, did not mention any facts that would support a charge to the violent subsection of second-degree burglary. App. 128, ll. 4-19. He testified Mr. Suggs was ineffective for failing to object to Petitioner being sentenced under the violent subsection of second-degree burglary instead of the non-violent subsection for which he was indicted. App. 133, 1-2. Petitioner testified Mr. Suggs allowed him to plead guilty to the violent subsection, and allowed the indictment to be constructively amended to a violent burglary. App. 128, l. 25 – 129, l. 3. Petitioner testified he did not review any of his indictments with Mr. Suggs. App. 140, ll. 19-23. Petitioner further testified but for Mr. Suggs's error, he would not have pled guilty but would have proceeded to trial. App. 129, ll. 3-5.

Mr. Lewis, the assistant public defender who also represented Petitioner from April 2013 to September 3, 2013, testified he relayed the State's plea offer of eight and one-half years (violent) or twelve years (non-violent). App. 144, ll. 12-15. He testified this plea offer was relayed at the April 22, 2013 status conference and Petitioner did not want to take the plea deal. App. 144, l. 19 – 145, l. 1. *See also* App. 56, ll. 15-17. Mr. Lewis stressed that he went over the plea offer with Petitioner numerous times, but Petitioner rejected the offer. App. 144, ll. 22-25.

Mr. Suggs testified Petitioner had numerous charges and he was representing Petitioner on five of the charges. App. 152, ll. 1-3. He testified he had discussions with Petitioner early on in his representation and kept close contact with Petitioner's wife throughout his representation. App. 152, ll. 6-25. Mr. Suggs testified he did not engage in plea negotiations with the assistant solicitor and was ready to go to trial. App. 155, ll. 11-19. Mr. Suggs testified he was not present at the status conference when Petitioner rejected the State's plea offer to plead to all charges for eight and one-half years (violent) or twelve years (non-violent). App. 165, ll. 9-12. He further testified he could not specifically recall going over the rejected plea offer with Petitioner but is sure he must have discussed it prior to the plea because the solicitor would have informed him about it. App. 161, ll. 2-12; 165, ll. 2-8.

Mr. Suggs testified he met with Petitioner the morning of the plea and discussed all of Petitioner's charges, including the charges on which he was not initially hired to represent Petitioner. App. 156, ll. 23-25.

Mr. Suggs testified he believed Petitioner was ready for the plea and made the plea knowingly and voluntarily. App. 158, ll. 5-17. He testified the second-degree burglary charge for indictment 2010-GS-17-469 was properly under the violent subsection because it was a burglary of a school building that occurred at nighttime. App. 158, ll. 18-25. He testified Petitioner

understood that he was pleading to a violent offense and Mr. Suggs explained what it meant for Petitioner to plead guilty to a violent crime. App. 159, ll. 3-6. Mr. Suggs testified ultimately it was in Petitioner's best interest to plead guilty due to the large number of charges he was facing. App. 159, l. 23 – 160, l. 9.

Deficiency

The PCR court correctly found that Mr. Suggs was not ineffective for failing to object to indictment 2010-GS-17-469 to which Petitioner pled guilty and was sentenced to violent second-degree burglary instead of nonviolent second-degree burglary. Mr. Suggs was not deficient in failing to object to Applicant's indictment or guilty plea. It was well established throughout the course of Petitioner's case that he was pleading guilty to the violent subsection of second-degree burglary. The plea offer Petitioner received from the State, that he rejected on the record during a status conference on April 22, 2013, was to plead guilty to second-degree burglary (violent). App. 56, ll. 21-22. Both of Petitioner's attorneys and the prosecuting solicitor understood the charge and the plea to be second-degree burglary (violent). Mr. Suggs expounded on the fact that the plea was to the violent subsection when he addressed the plea court prior to sentencing. App. 17-18.

Most importantly, the plea judge conducted an extensive colloquy with Petitioner during his guilty plea, making sure the plea was being made knowingly and voluntarily. Petitioner acknowledged he understood when the plea judge informed Petitioner that he would be pleading guilty to second-degree burglary (violent), the charge carried up to fifteen years, and the charge was a violent and serious offense. App. 5, ll. 2-8. Petitioner was well aware of the charge and the guilty plea transcript clearly reflects a knowing and voluntary guilty plea to which Petitioner fully admitted his guilt and received a great benefit by the State agreeing to dismiss a litany of

charges in exchange for Petitioner's guilty plea. App. 2-3.

Although there is little information available, Mr. Suggs provided credible testimony the indictment 2010-GS-17-469 was properly under the violent subsection because it was a burglary of a school building that occurred at nighttime. App. 158, ll. 18-25. Any alleged error with indictment 2010-GS-17-469 should be viewed as a scrivener's error in the title of the indictment. The indictment is titled "non-violent" however the facts of the indictment can only support the violent subsection of § 16-11-0312. The indictment itself alleged Petitioner "enter[ed] without consent and with the intent to commit a crime therein, the Dillon School District Maintenance Shop, located at 1628 Hwy 301 South, in violation of Section 16-11-0312, S.C. Code of Laws. 1976, as amended." App. 64. These facts can only support subsection (B) of § 16-11-0312 and can never support the nonviolent subsection (A), because (A) requires the person enter a **dwelling** without consent and with the intent to commit a crime therein, whereas (B) requires the person to enter a **building** without consent and with the intent to commit a crime therein along with aggravating circumstances. *See* S.C. Code § 16-11-0312. Despite not listing out the aggravating circumstances, the facts in the indictment allege a violation under § 16-11-0312 due to Petitioner entering a building – the Dillon County Maintenance Shop¹ – and therefore the body of the indictment would put Petitioner on notice that he was being charged with second-degree burglary (violent). Because the body of the indictment alleged facts that could only support second-degree burglary (violent) under § 16-11-0312 and could never support second-degree burglary (nonviolent), the title should be viewed as a scrivener's error. Additionally, there was a clear meeting of the minds between the solicitor, defense attorneys, plea judge, and Petitioner throughout Petitioner's case and during the extensive plea colloquy that he was

¹ This Maintenance Shop is clearly a building and not a dwelling under § 16-11-310, as a dwelling is used or normally used for sleeping, living, or lodging by a person.

pleading to second-degree burglary (violent) under this indictment. A presumption of regularity attaches to proceedings in the Court of General Sessions. *Pringle v. State*, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (citing *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669 (1959); *State v. Jones*, 211 S.C. 319, 45 S.E.2d 29 (1947); *State v. Waring*, 109 S.C. 52, 95 S.E. 143 (1918)). Given this presumption, the PCR court correctly found Mr. Suggs was not deficient for failing to object to Petitioner's indictment when all parties involved understood the plea to be second-degree burglary (violent) and Petitioner acknowledged his plea was made freely and voluntarily after an extensive colloquy and gave no indication to the contrary.

Prejudice

The PCR court correctly found that Petitioner did not meet his burden of proving that he was prejudiced by pleading guilty to second-degree burglary (violent). At the PCR hearing, Petitioner testified he was asking the PCR court to "correct [his] sentence and to allow [him] to plead guilty to the plea offer that [Petitioner] was originally offered." App. 104, ll. 18-19. It was well established on the record that Petitioner rejected his original plea offer. App. 56, ll. 2-22. When asked if he wanted a new trial on all charges, Petitioner simply told the PCR court "Yeah. Whatever the Court sees fit for this case." App. 105, l. 13. The PCR court found Petitioner's testimony was not credible. App. 188. Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly observe the witnesses. *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, Petitioner prevailing on PCR would open him up to facing up to seventeen charges across two counties and facing considerable time. App. 2. He has failed to show that he would rather proceed to trial on all charges, and the PCR court correctly found he had not proven the prejudice prong of *Strickland*.

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,

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January 17, 2018

STATE OF SOUTH CAROLINA

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Certiorari to Dillon County
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2014-CP-17-0209
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ANTHONY COOK, #328485,

Petitioner,

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STATE OF SOUTH CAROLINA,

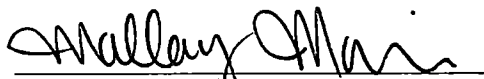
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

Kathrine H. Hudgins, Esquire
1330 Lady Street, Ste. 401
Columbia, SC 29201

This 17th day of January, 2018



MALLORY MORRIS
Legal Assistant for Respondent