ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr, Circuit Court Judge

Appellate Case No. 2015-000785

EDWARD RORECUSE YOUNG,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

BRIEF OF PETITIONER

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PETITIONER'S STATEMENT OF ISSUE ON APPEAL

Did the PCR judge err in finding Respondent met his burden of proving plea counsel was deficient in explaining actual and constructive possession and that he suffered prejudice as a result?

STATEMENT OF THE CASE

Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During the November 2010 term, the Greenville County Grand Jury indicted Respondent for trafficking cocaine base (2010-GS-23-9215A). (App.pp.156-57). Scott D. Robinson, Esquire represented Respondent. On October 9, 2012, Respondent proceeded to trial before the Honorable William H. Seals Jr. as a bench trial. Prior to the trial concluding, Respondent pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970). Judge Seals sentenced Respondent to seven years imprisonment for trafficking cocaine base (10-28 grams), second offense. (App.p.82; p.155). Respondent did not appeal his sentence or convictions.

Respondent filed an application for post-conviction relief (PCR) on September 27, 2013. (App.pp.85-89). The State made its return on March 26, 2014, requesting an evidentiary hearing be convened. An evidentiary hearing was held on December 16, 2014 at the Greenville County Courthouse before the Honorable Eugene C. Griffith Jr. (App.pp.96-148). Respondent was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. Respondent testified on his own behalf. Respondent's plea counsel also testified as did Respondent's brother Adidas Glenn. Following the evidentiary hearing, Judge Griffith granted Respondent's post-conviction relief and ordered a new trial by written order filed March 19, 2015. (App.pp.150-54).

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 his or her 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 applicant must prove "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. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 , citing Strickland, at 688. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that 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 (1985). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR judge erred in finding Respondent met his burden of proof under Strickland v. Washington because he demonstrated plea counsel failed to properly explain the concepts of actual and constructive possession and that he was prejudiced because he pled guilty on plea counsel's advice.

The PCR judge erred in granting post-conviction relief in this case. Respondent failed to satisfy his burden of proving either that plea counsel was deficient or that he suffered prejudice as a result of the alleged deficiency.

Prior to the commencement of a bench trial in this case, plea counsel moved to suppress the drugs and Respondent's inculpatory statement. Deputy Neil Mitchell of the Greenville Sheriff's Office testified he was doing yardwork outside of his residence when he saw Respondent[1] exit a dark Crown Victoria and run "off the road into the woods there." (App.pp.5-6). Deputy Mitchell testified he walked towards the woods to look for Respondent, who he observed "bent over at the waist." Deputy Mitchell testified he confronted Respondent when he came out of the woods and back towards the vehicle, and that Respondent claimed he was using the bathroom. (App.pp.9-11). Deputy Mitchell noted the Crown Victoria's tag number and investigated the area of the woods where he saw Respondent. (App.pp.12-13). Deputy Mitchell testified he went to "the wood line where [he] last saw [Respondent]" and found a paint can with a pill bottle inside a Ziploc bag. (App.pp.13-14). Based upon his experience, Deputy Mitchell testified the rock-like substance in the pill bottle was crack cocaine. (App.pp.14-15). Deputy Mitchell reported the events to dispatch and a short time later received a call that the Crown Victoria was stopped. (App.pp.15-17). Deputy Mitchell – now wearing a Sheriff's Office vest and displaying a badge – testified he went to that scene and identified Respondent as the person he saw in the woods earlier. (App.pp.18-21). Deputy Mitchell testified he read Respondent his

[1] Deputy Mitchell performed an in-court identification of Respondent. (App.p.12).

Miranda rights and Respondent admitted he was paid $50 to retrieve the paint can. (App.pp.22-23).

Mike Moore testified he was a deputy with the Sheriff's Office at the time of this incident. (App.pp.48-49). Moore responded to the scene and took possession of the suspected crack cocaine. (App.pp.49-50). Moore later detained the suspect vehicle and witnessed Deputy Mitchell reading Miranda rights to Respondent (App.pp.51-55).

Bradley Baxter testified he was a licensed private investigator who tape-recorded the area in the woods where the paint can was found. (App.pp.63-64).This tape was entered into evidence. (App.p.67).

Plea counsel argued the State did not prove Respondent had dominion and control over the paint can or the drugs. Plea counsel argued Deputy Mitchell did not see Respondent bending over the paint can and that his mere presence in the area was insufficient. (App.pp.70-73). The judge, as this was a bench trial, left the record open for additional testimony regarding the suppression motion.[2] (App.pp.74-75).

After the bench trial was about to begin, the parties had a bench conference and a brief recess. (App.pp.75-76). When the judge went back on the record, the clerk of court announced Respondent was pleading guilty. (App.p.76).The plea judge advised Respondent of the sentence range for the charge. (App.p.77). The plea judge advised Respondent he could continue with his bench trial and explained the rights he would be waiving in pleading guilty. (App.pp.77-79). Respondent explained he was satisfied with plea counsel and was not coerced into pleading guilty. (App.p.79).The assistant solicitor recited the facts and plea counsel noted this was an Alford plea.(App.pp.80-81). Respondent did not dispute either the factual basis for his guilty plea or the recitation of his prior convictions. (App.p.82).

[2] Additionally, the judge found the statement was freely and voluntarily given. (App.p.74).

At the PCR hearing, Respondent testified he discussed his case with plea counsel. (App.p.115). Respondent testified plea counsel said the State could not prove actual possession in his case. (App.p.116). Respondent testified plea counsel explained constructive possession to him but not actual possession. (App.pp.126-27). Respondent testified plea counsel told him there would be a suppression hearing to get one of the two incidents suppressed. (App.pp.116-17). Respondent testified after the suppression hearing plea counsel told him in light of the statement, he should consider pleading guilty. (App.pp.118-19). Respondent testified plea counsel said it would be hard to fight the charge because the drugs were coming in and so he pled guilty on plea counsel's advice. (App.pp.119-20). **Respondent admitted on cross-examination, however, that he pled guilty just to resolve the matter.** (App.p.128).

Plea counsel testified the goal of the suppression hearing was to "keep the drugs out." (App.pp.100-01). Plea counsel testified this was a constructive possession case because Respondent "did not have dominion and control over that paint can." (App.p.101). Plea counsel testified this was the argument he made at the suppression hearing. (App.pp.103-04). Plea counsel testified he explained constructive possession to Respondent but that they did not discuss actual possession because "[t]hese drugs were not found on [Respondent]." (App.pp.101-02). Plea counsel testified that "[i]f the drugs were allowed in, I think it would have been prudent to consider a guilty plea." (App.p.106). Plea counsel testified that, after the drugs were not suppressed during the bench trial, he had adequate time to discuss with Respondent the options of either proceeding with the bench trial or entering a guilty plea. (App.pp.111-12).

In granting Respondent's application for post-conviction relief, the PCR judge found "plea counsel failed to render reasonably effective assistance under prevailing professional norms by failing to accurately explain actual and constructive possession to [Respondent] and

giving erroneous legal advice." The PCR judge also found Respondent "pled guilty after relying on plea counsel's advice" and thus proved he suffered prejudice. (App.p.153).

The PCR judge erred in finding Respondent met his burden of proving plea counsel was deficient for "by failing to accurately explain actual and constructive possession to [Respondent] and giving erroneous legal advice." The PCR judge's finding was in error because, based upon the facts of this case, it was not necessary to discuss actual possession.

The statue for trafficking cocaine base/crack cocaine explicitly states one can be found guilty of the offense based upon a variety of facts:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony.

S.C. Code Ann. § 44-53-375(C)(1) (Supp. 2010) (emphasis added). "Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." State v. Burgess, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (quoting State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)).

Respondent and plea counsel both testified Respondent's story was that the drugs were not his. Respondent and plea counsel both testified plea counsel explained the theory of constructive possession to Respondent and this was argued at the suppression hearing. Respondent and plea counsel both testified plea counsel did not explain the theory of actual possession. Based upon the facts of Respondent's case (and Respondent's own version of

events), however, there was no reason to either explain or explore the concept of actual possession. The crack cocaine was not found either in the Crown Victoria or on Respondent's person. Rather, Respondent was spotted in the general vicinity of a wooded area where crack cocaine was found in a paint can.

Plea counsel specifically testified his trial strategy was to move to suppress the drugs because Respondent did not have dominion or control over the crack cocaine – and thus was not in constructive possession of it. This was a valid trial strategy that should not have been second-guessed by the PCR judge. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119,122,417 S.E.2d 529, 531 (1992).

Based upon both the facts of the case and his conversations with Respondent, it was not necessary for plea counsel to discuss actual possession. This concept was not germane to the case at hand. Further, plea counsel cannot be found deficient for failing to explain actual possession when, based upon the facts before him, he chose to instead argue Respondent was not in constructive possession of the crack cocaine. Plea counsel need not have discussed this strategic decision with Respondent. See Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 657 (1988) ("The adversary process could not function effectively if every tactical decision required client approval.").

As this case did not center on whether Respondent was in actual possession of the crack cocaine, the PCR judge clearly erred in finding plea counsel deficient because he did not explain this concept to Respondent. Plea counsel made the strategic decision to argue at the suppression hearing that Respondent was not in constructive possession of the crack cocaine. The PCR judge also erred in finding plea counsel gave "erroneous legal advice." Respondent failed to demonstrate either that plea counsel gave erroneous advice or that he relied upon said advice. See Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001) (holding a PCR applicant must show his attorney's performance "fell below an objective standard of reasonableness"). As such, Respondent did not meet his burden of proving plea counsel's representation was deficient. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Furthermore, the PCR judge erred in finding Respondent met his burden of proving he suffered prejudice because he "pled guilty after relying on [C]ounsel's advice." The PCR judge's finding was in error because Respondent did not base his decision to plead guilty solely upon his conversations with plea counsel.

On direct examination at the PCR hearing, Respondent stated he pled guilty after the suppression hearing based upon plea counsel's advice. Specifically, he stated plea counsel said that, as his statement had been found voluntary, he "should consider taking the plea." (App.p.119). Respondent stated he pled guilty because plea counsel "was saying that like I was going to lose. And I didn't want to lose." (App.p.119). Respondent contradicted himself later during his direct examination when his attorney asked "[i]f the drugs weren't suppressed and if your statements, for example, were allowed in, would you have wanted to proceed to trial?" and he responded "[y]es, I would." (App.p.124). This was exactly the scenario in place when Respondent chose to abandon the bench trial and plead guilty.

Furthermore, on cross-examination Respondent admitted he pled guilty just to resolve the matter. Respondent stated "I didn't know if I could do it again" and "[b]ecause it had been put off for so long. So I didn't want to keep continuing to go through it. So, yes, I took the plea." (App.p.128). Based on Respondent's own testimony, there is no reasonable probability that – but for plea counsel's representation – he would have proceeded with the bench trial.

As demonstrated by Respondent's own testimony, he pled guilty – at least in part – so that he could have a resolution to this charge. The PCR judge, therefore, clearly erred in finding Respondent pled guilty simply because he relied upon plea counsel's advice. Respondent did not meet his burden of proving he was prejudiced by plea counsel's representation. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

As Respondent failed to meet this burden of proving ineffective assistance of plea counsel, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence."). This Court must reverse the PCR judge's order, as it is not supported by any probative evidence. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For the foregoing reasons, this Court should vacate the order granting post-conviction relief and affirm Respondent's convictions because the post-conviction relief judge erred in finding Respondent met his burden of proof.

Respectfully submitted,

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By: _____
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December 8, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
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The Honorable Eugene C. Griffith, Jr, Circuit Court Judge

Appellate Case No. 2015-000785

EDWARD RORECUSE YOUNG,

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CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Brief of Petitioner** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 8th day of December, 2017.

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DEC 08 2017
S.C. SUPREME COURT

December 8, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Edward Rorecuse Young v. State of South Carolina**
Appellate Case No. 2015-000785
Lower Court Case 2013-CP-23-5236

Dear Mr. Shearouse:

Attached are the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office. Also, per Rule 243(j) included are thirteen (13) additional copies of the Appendix.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc

cc: Robert M. Dudek, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)