STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Michael G. Nettles, Circuit Court Judge

STEFANO TYSHAWN BROOKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001615

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel for erroneously advising Petitioner he lacked standing to challenge the legality of the checkpoint because he was a passenger and not the driver, where petitioner pled guilty to trafficking in cocaine twenty-eight to one hundred grams based on that erroneous advice and received a twenty-five year prison sentence?

STATEMENT

On January 27, 2011, Petitioner was indicted for trafficking cocaine base one hundred to two hundred grams by the Horry County Grand Jury. App. 143 – 144. In front of the Honorable Benjamin H. Culbertson, Petitioner plead guilty to the lesser included offense of trafficking in cocaine twenty-eight to one hundred grams. App. 1. Clifford L. Welsh represented Petitioner and Laura Richardson represented the state. Id.

The court accepted Petitioner's plea, but stayed his sentencing until a hearing on June 14th 2012. App. 14, l. 4. However Petitioner did not appear for the initial sentencing hearing, he absconded from the state until he was extradited back to South Carolina for the sentencing hearing on February 14, 2014. App. 18, ll. 3 – 13.

At the sentencing hearing, in front of Judge Culbertson again, Petitioner was sentenced to twenty-five years imprisonment and a $50,000 fine. App. 22, ll. 18 – 22. Clifford L. Welsh represented Petitioner and Laura Richardson represented the state. App. 16.

Petitioner filed a motion for reconsideration and a hearing was held on March 25, 2015. App. 25 – 27. Petitioner was represented by Clifford L. Welsh and the state was represented by Thomas Terrell. App. 27. Judge Culberston denied the motion. App. 34, ll. 20 – 22.

Petitioner then filed a post-conviction relief (PCR) application. App. 36 – 41. He alleged ineffective assistance of counsel and that his guilty plea was involuntary. Id. On July 31, 2015, the state filed its return. App. 42 – 46. On February 7, 2017, the PCR hearing was held in front of the Honorable Michael G. Nettles. App. 50. L. Morgan Martin represented Petitioner and Ralph Prioleau and Rutledge Johnson represented the state. Id. Judge Nettles filed an order of dismissal on March 21, 2017. App. 104 – 114.

On, April 11, 2017, PCR counsel filed a motion to reconsider and to alter or amend the judgment. App. 115 – 116. On June 1, 2017, a hearing was held in front of the Honorable Michael G. Nettles. App. 117. L. Morgan Martin represented Petitioner and Valerie Giovanoli represented the state. Id. Judge Nettles denied Petitioner's reconsideration motion. App. 139, l. 25 – 140, l. 1. This petition follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel for erroneously advising Petitioner he lacked standing to challenge the legality of the checkpoint because he was a passenger and not the driver, where petitioner pled guilty to trafficking in cocaine twenty-eight to one hundred grams based on that erroneous advice and received a twenty-five year prison sentence.

Relevant Facts

At Petitioner's plea hearing the state alleged the facts as follows. On July 30, 2010, police setup a license checkpoint in Horry County. App. 9, ll. 9 – 10. Petitioner, a passenger in a vehicle driven by a third party was stopped at the check point. App. 9, ll. 12 – 21. Police saw an "alcoholic beverage" in plain view and asked Petitioner to step out of the car. Id. As Petitioner stepped out a clear plastic bag fell between the door and the seat. Id. The bag contained 102 grams of cocaine. Id.

Petitioner pled guilty to trafficking in cocaine twenty-eight to one hundred grams. App. 2, ll. 7 – 9. During the plea hearing, plea counsel opined that the reason Petitioner pled was, "Mr. Brooks was actually a passenger in the vehicle and so it would affect his standing to challenge the search." App. 11, ll. 3 – 5. Judge Culbertson sentenced Petitioner to the maximum length of twenty-five years imprisonment and a $50,000 fine. App. 22, ll. 18 – 22.

Petitioner filed a PCR application that alleged ineffective assistance of counsel for failure to conduct an adequate investigation into the case, failure to advise Petitioner of all possible defenses that could be made at a trial, and, that because of those failures, Petitioner's plea was involuntary. App. 36 – 41.

At the PCR hearing, PCR counsel stated that the, "basis for our petition today is that [Petitioner] received ineffective assistance of counsel in that [Petitioner's] attorney failed to file a motion to suppress the search and seizure of [Petitioner]." App. 53, ll. 13 – 17. Petitioner testified that he did not know what motions plea counsel should have filed, but that he would have wanted to file any and all motions that may have resulted in a dismissal. App. 57, ll. 16 – 18; App. 57, l. 24 – 58, l. 1.

PCR counsel discussed the necessary steps a reasonably competent attorney would take in a case involving a search and seizure at a license checkpoint and how plea counsel failed to take any of the necessary actions to defend Petitioner. "The United States Supreme Court and the State of South Carolina's Supreme Court has laid down some basis for how [the police] must conduct [license checkpoints] and what [the police] must do." App. 54, ll. 4 – 7.

When plea counsel was called to testify at the PCR hearing, plea counsel admitted that he did not file a motion to suppress nor did he file any information request to South Carolina Highway Patrol in regards to the basis for initiating the license check point at that time and location. App. 63, ll. 6 – 15. Plea counsel did not speak to any of the highway patrolmen that were involved in the search and seizure to find out the constitutional basis of the checkpoint. App. 63, ll. 16 – 23. Plea counsel did not research on the checkpoint's constitutionality. App. 67, ll. 5 – 21. That was the reason plea counsel gave erroneous advice. If plea counsel researched as PCR counsel did, the constitutionality of the checkpoint, he would have found that there was no evidence to support it.

PCR counsel then turned his questioning of plea counsel from the lack of investigation to the wrongful advice plea counsel gave Petitioner on standing to challenge the search and seizure. "Were you under the impression that the fact that [Petitioner] was a passenger in the automobile

would affect his ability to have standing to object to an illegal stop and search?" App. 63, l. 24 – 64, l. 2. Plea counsel stated he was unsure about the status of Petitioner's standing to challenge the search and seizure because, "it's still kind of an open question, I think, under the law." App. 64, ll. 3 – 7.

Upon further questioning, plea counsel admitted he gave deficient performance when he misadvised Petitioner on his standing to challenge the search and seizure. "So to the extent you advised [Petitioner] that as a passenger in the vehicle it would affect his standing to challenge the search, that's not really accurate; is it?" Plea counsel admitted his advice was, "not entirely accurate." App. 64, ll. 3 – 7.

To prove there was no empirical evidence to justify the check point, PCR counsel called William Michael Clemons, the custodian of records for South Carolina Highway Patrol, to testify. App. 81, l. 20. Prior to the hearing, PCR counsel served a subpoena on South Carolina Highway Patrol, which requested, "Any and all South Carolina Department of Public Safety records, data or other documentation utilized in the vehicle license checkpoint operation that was carried out on July the 30th, 2010, at the intersection of SC secondary road 111 and Highway 57 North in the little River section of Horry County." App. 82, ll. 20 – 25. Clemmons was the officer who searched, pursuant to the subpoena, for any data on the checkpoint in question, but found no records that established a constitutional basis for the checkpoint. App. 83, ll. 18 – 23.

PCR counsel explained that plea counsel provided ineffective assistance that prejudiced Petitioner because he did not investigate the checkpoint in question to see if there was a constitutional basis for it. Had plea counsel bothered to investigate, he would have found, "there is nothing there." App. 98, ll. 10 – 23. PCR explained that the police need to keep records that justify the constitutionality of license check road blocks. App. 90, l. 17 – 91, l. 5. Therefore, had

plea counsel investigated the constitutional basis for the checkpoint, he would have found that none of the required records existed. Thus, the checkpoint was unconstitutional and Petitioner was prejudiced because there was a reasonable probability that his suppression motion would have succeeded.

The PCR court denied Petitioner's application for post-conviction relief and in the order of dismissal it found, "Applicant waived all non-jurisdictional defenses when he pled guilty, including the right to challenge the checkpoint, challenge the search and seizure of the drugs, and the drugs, and right to present any defense." App. 114. The court held that even if plea counsel was ineffective there was no resulting prejudice because Applicant could not prove he would have prevailed on his suppression motion. App. 115.

That denial was an error and that error prejudiced Petitioner.

Discussion

In Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007), the Supreme Court unanimously held that a passenger in a vehicle has the exact same right to privacy as the driver. In that case, Brendlin was charged with possession and manufacture of methamphetamine and moved to suppress the evidence obtained in searches of his person and the car in which he was a passenger. Id. at 253, 127 S.Ct. at 2404. The Supreme Court decided a passenger's right to privacy triggers when, "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." Id. at 257, 127 S.Ct. at 2406-2407. Therefore, plea counsel provided incorrect advice when he said being a passenger in the vehicle would affect Petitioner's standing because there is no such thing as "lesser" standing. Petitioner either had standing to challenge the checkpoint or he did not. Brendlin clearly states that

Petitioner did have standing and therefore plea counsel provided ineffective assistance that prejudiced Petitioner when his wrongful advice induced Petitioner to plea.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688, 104 S.Ct. at 2064. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

The difference, "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S.Ct. at 370. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

In Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399 (2012), the United States Supreme Court noted that the, "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea." Id. at 141, 132 S.Ct. at 1405 (citations and internal quotation omitted). The Court further emphasized that "*[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.*" *Id.* (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations]... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted).

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685, 104 S.Ct. at 2063 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275, 63 S.Ct. 236, 240 (1942)). Additionally, a guilty plea that was entered by one fully aware of the

direct consequences "must stand *unless* induced by . . . misrepresentation." Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

In the instant case, the moment that the car stopped at the license checkpoint, Petitioner was seized and his right to privacy, which was identical to the driver's right to privacy, was triggered. Plea counsel's incorrect analysis of law led plea counsel to wrongfully advise Petitioner that his standing, as a passenger, to challenge the search and seizure was somehow weaker than the driver's standing. When he gave incorrect advice to Petitioner, plea counsel provided ineffective assistance that induced Petitioner to plead guilty.

Plea counsel's deficient performance resulted in prejudice to Petitioner because there was a reasonable probability that his motion to suppress would likely have been successful. In order for police to perform a proper license checkpoint there are a number of constitutional requirements that must be met.

In State v. Vickery, 399 S.C. 507, 732 S.E.2d 218 (2012), the Court of Appeals upheld the constitutionality of a license checkpoint. However, the court applied the three prong balancing test from Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979). The Brown test determined the constitutionality of a traffic checkpoint by weighing, "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown, at 51-52, 99 S.Ct. at 2640. The Vickery court held that under second prong of Brown, "empirical data on the effectiveness of the checkpoint" must be used to balance the other two prongs set forth." Vickery, at 521, 732 S.E.2d at 225. In Vickery, the state called *multiple* police officers to testify to the data that served as the constitutional basis for the effectiveness of the checkpoint. Id. at 520, 732 S.E.2d at 224.

(emphasis added) Therefore, in Vickery the state met its burden of proof for the checkpoint to be constitutional.

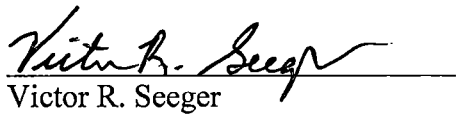
However, in the instant case, there was no such record of empirical data serving as the constitutional basis for the checkpoint. In Vickery, the officers testified to *citizen complaints* about the area, *personal knowledge* of problems at the intersection *after seeing incident reports*, *traffic tickets*, and *statistics*. (emphasis added) "Additionally, the Traffic Enforcement Activity Reports for dates prior to [the date of the checkpoint in question in Vickery] show that license checkpoints in the same area resulted in thirty to sixty traffic and criminal offenses on each occasion." Id. Therefore, the instant case is distinguishable from Vickery because here the police had no record of the effectiveness of the checkpoint before they set it up.

Petitioner's case is akin to State v. Groome, 378 S.C. 615, 664 S.E.2d 460 (2008) where Groome's motion to suppress was affirmed because the record supported the trial court's finding that the state failed to produce any evidence satisfying the second prong of the Brown test. Groome, at 619-20, 664 S.E.2d at 462. Here the only evidence put forward about the potential effectiveness of the checkpoint was the testimony from Clemmons, the records custodian, at PCR. However, his testimony did not rise to the level of empirical evidence presented in Vickery. Clemmons did not live in Horry County at the time of the checkpoint and could not testify to the effectiveness of the checkpoint being in that specific location. Clemmons did not testify to neighborhood complaints, personal knowledge of the intersection, incident reports, tickets, or statistics to justify the check point. Clemmons could only testify about the *general area* having DUI crashes "and stuff." App. 87, ll. 4 – 5. (emphasis added) The court then asked Clemmons if the checkpoint was a sobriety checkpoint or a license checkpoint and he could not answer because he did not know. App. 87, ll. 6 – 11.

Therefore, because of the lack of empirical evidence to support the constitutional basis of the checkpoint under Brown, there was a reasonable probability that Petitioner's suppression motion would have been successful. Thus, plea counsel provided ineffective assistance of counsel when he failed to investigate the constitutional basis of the checkpoint and when he misadvised Petitioner that only a driver, and not a passenger, in a car could have standing to challenge the illegal search and seizure. Plea counsel's deficient performance prejudiced Petitioner because but for that wrongful advice and deficient investigation, which induced Petitioner to plead guilty, Petitioner would have gone to trial.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of April, 2018.

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STEFANO TYSHAWN BROOKS,

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V.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Stefano Tyshawn Brooks, #358949, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of April, 2018.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 16th day of April, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023