THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of General Sessions
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000095

Jerome J. Noone, Jr,.. Petitioner,

v.

State of South Carolina, ... Respondent.

Petition for Writ of *Certiorari*

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QUESTIONS PRESENTED

Question I

In determining deficient performance, did the PCR court err as a matter of law when it failed to consider *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989), *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991), and *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991), regarding counsel's obligation to provide correct advice about the collateral consequences of a guilty plea once counsel undertakes to provide that advice, and considered letters from the Department of Motor Vehicles to Jerome Noone rather than Mr. Noone's uncontested testimony about Scott Thomason's legal advice regarding the consequences of the guilty plea to Mr. Noone's driver's license?

Question II

Did the PCR court apply the correct standard of review for determining prejudice when it considered the strength of the State's evidence rather than Jerome Noone's testimony that, but for counsel's erroneous advice about the implications of the guilty plea to his driver's license, he would not have pleaded guilty and would have proceeded to trial?

STATEMENT OF THE CASE

On September 24, 2015, the South Carolina Highway Patrol arrested Jerome J. ("Jerry") Noone for second-offense driving under the influence. A. 10. On May 26, 2016, the Anderson County Grand Jury returned a true bill indictment charging Mr. Noone with second-offense driving under the influence. A. 11-12. On February 2, 2017, Mr. Noone pleaded guilty in transfer court[1] to driving under the influence, first offense. Stephanie Looper represented the State, and Joseph R. Oppermann represented Mr. Noone. The Magistrate Court Judge imposed a fine of $400.00, which increased to $1,092.00 after adding court costs. A. 1. There is not a transcript of this proceeding.

[1] Under certain circumstance, S.C. Code Ann. § 22-3-545 grants the Solicitor discretion to transfer General Sessions Court cases to Magistrate Court. Driving under the influence, second offense, qualifies for transfer under the statute. A transcript of the guilty plea is not available.

On May 17, 2017, Mr. Noone filed an application for post-conviction relief alleging he was denied the right to effective assistance of counsel because his plea "counsel affirmatively misadvised [him] about the consequences to [his] driving privileges. But for plea counsel's affirmative mis-advice, Mr. Noone would have proceeded to trial."[2] A. 13-19. The State served its return on July 21, 2017. A. 20-24. The Honorable R. Scott Sprouse convened an evidentiary hearing on October 6, 2017. Charles Grose represented Mr. Noone. Lindsey A. McCallister represented the State. Mr. Noone and Mr. Oppermann testified during the hearing. A. 24-72. By written order dated November 20, 2017, Judge Sprouse dismissed Mr. Noone's PCR application. A. 2-8. On November 30, 2017, Mr. Noone served a Rule 59(e), SCRCP motion. A. 25-28. By written order dated December 18, 2017, Judge Sprouse denied the Rule 59(e) motion. A. 9. This petition for writ of *certiorari* follows.

STATEMENT OF FACTS

Mr. Noone moved from California to Easley, South Carolina, where he has lived for over ten years. He is the self-employed owner of Noone Customs, LLC restoring classic automobiles. In late-September 2015, Mr. Noone was restoring a Corvette transmission for a car show. A. 39-40

After the State charged Mr. Noone with second-offense driving under the influence, he applied for a public defender. By letter dated June 10, 2016, the Anderson County Public Defender's Office notified Mr. Noone that Scott Thomason would be his attorney and scheduled an attorney-client conference for July 12, 2016. During the

[2] The Uniform Post-Conviction Relief Act confers "standing to bring the action where the challenged conviction did not result in incarceration and where petitioner alleges he is suffering continuing effects from his conviction." *Jackson v. State*, 331 S.C. 486, 488, 489 S.E.2d 915, 916 (1997).

meeting, the two reviewed the State's written discovery response, watched the videotape of the traffic stop, and Mr. Thomason communicated the State's plea offer. Mr. Noone's "main concern" was how accepting the plea offer "would effect [his] driver's license." Mr. Noone had this concern, not only because of transportation in general, but also because of his business that involves "a lot of driving" including "test driv[ing]" the cars and "transport[ing] cars to car shows for clients." Mr. Noone testified about his conversation with Mr. Thomason:

> Q: What did you understand from Mr. Thomason?
>
> A: Well, he told me that they were going to try it as a first offense. And that I paid a fine.
>
> And I said, So when this is done, it's going to be a first offense, that what it will be listed as?
>
> He said, yes.
>
> So, our time has already gone through the laps [verbatim], so we're already at this, like, one year point where I haven't been able to drive. So, I will be able to get my driver's license back and just start to move on with my life?
>
> He said, Yes, you should be fine.
>
> Okay. So, I agreed it because I thought it was just going to be considered a first offense.
>
> Q: In every respect?
>
> A: In every respect, yes.

A. 40-46- 11; Applicant's Exhibit 1, A. 73.[3]

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[3] The suspension period for refusing to consent to the breath test is six months. S.C. Code Ann. §§ 56-5-2950(B)(1) and 2951(I)(1)(a). The suspension period for first-offense driving under the influence is six months. S.C. Code Ann. § 56-5-2990(A)(2). From the date of the traffic stop on September 24, 2015 to the date of the guilty plea on February 2, 2017 was more than one year, leaving Mr. Noone with the impression that he

Mr. Thomason "had a heart attack and passed away" before Mr. Noone's guilty plea occurred on February 2, 2017. Joey Opperman, also of the Anderson County Public Defender's Office, took over Mr. Noone's case. Mr. Noone met Mr. Oppermann for the first time at the courthouse the day of the guilty plea. Mr. Oppermann confirmed the State was still offering a plea to a first offense. Mr. Noone continued to rely on "Mr. Thomason's explanations to [him] about the driver's license consequences." He entered the guilty plea. A. 1, 46-47.

After the guilty plea, Mr. Noone received a notice from the Department of Motor Vehicles that he was a habitual traffic offender and would not be eligible for a driver's license for five years. *See* S.C. Code Ann. § 56-1-1090. Mr. Noone testified:

> Q: Okay. If you had known that your driver's license – that you were going to be an habitual traffic offender and that your driver's licenses would be suspended for five years, would you have plead guilty?
>
> A: No, I would have went to trial.

A. 47-48; Applicant's Exhibit 2, A. 74-78.

After Mr. Noone received the habitual offender notice, he contacted Mr. Opperman about what could be done. Mr. Opperman recommended attorneys that might be able to help by pursuing post-conviction relief. A. 51-52.

Mr. Opperman was in his first week of employment with the Anderson County Public Defender's Office when he represented Mr. Noone at his guilty plea. On January 31, 2017, either Mr. Opperman or his paralegal contacted Mr. Noone to inform him of the court date. Mr. Opperman did not have a "clear memory" of his conversation with Mr.

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had already served the two suspensions. During the evidentiary hearing, the PCR court and counsel discussed the suspension periods. A. 67-68.

Noone on the day of the guilty plea, "besides that it was fast." Mr. Oppermann recalled his post-plea conversation with Mr. Noone:

> Sometime afterwards, I believe it was over a month, I don't remember the exact date or timeframe, he called to express his concern about receiving the habitual offender status. I'll note that when I first became aware of – first received paperwork for this hearing, I didn't remember at all. But when I went back and looked at the file, I remembered him calling me. He said he didn't realize when he entered the guilty plea, that this would be the consequence for his driver's license. Wanted to know if there was anything we can do about it. And so, what I did, I told him, Well, for our purposes the case is closed and it is too late to file a motion to reconsider. So, you probably have to go ahead and retain private counsel.

A. 53-57.

STANDARD OF REVIEW

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The 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.

Strickland, 466 U.S. at 694. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel's errors.

"It is well settled that the [Sixth Amendment] right to the effective assistance of counsel applies to certain steps before trial," *Missouri v. Frye*, 566 U.S. 134, 140 (2012), including "to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156 (2012). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 162-63 (internal quotations omitted). This Court has observed:

> In *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two part standard adopted in *Strickland* to guilty plea challenges bottomed on ineffective assistance of counsel. The Court reiterated that the defendant must show first that counsel's representation fell below the standard of reasonableness; and, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 106 S.Ct. at 370. Specifically, the Court stated that the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 106 S.Ct. at 370.

Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). *See also Frierson v. State*, No. 2016-001940, 2018 WL 2325560, at *3 (S.C. May 23, 2018) ("reiterate[ing] the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial"); *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.").

As the Supreme Court of the United States recently reminded, "The decision whether to plead guilty also involves assessing the respective consequences of a

conviction after trial and by plea." *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1961 (2017). The High Court cautioned, "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

On appeal, this Court "defer[s] to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). This Court "Questions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

ARGUMENTS

Question I

In determining deficient performance, did the PCR court err as a matter of law when it failed to consider *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989), *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991), and *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991), regarding counsel's obligation to provide correct advice about the collateral consequences of a guilty plea once counsel undertakes to provide that advice, and considered letters from the Department of Motor Vehicles to Jerome Noone rather than Mr. Noone's uncontested testimony about Scott Thomason's legal advice regarding the consequences of the guilty plea to Mr. Noone's driver's license?

The PCR court found Mr. Noone "met with Mr. Thomason on or about July 12, 2016," "was concerned about what would happen to his driving privileges becasue of his business is dependent on his being able to drive," and "his understanding from Mr. Thomason was that he would have to pay a fine, but his license would be restored after a short suspension." The PCR order continues, "[B]y applicant's own admission, [he and Mr. Thomason] discussed the consequences to [Mr. Noone's] driving record." The PCR

court additionally found that MR. Noone and Mr. Opperman did not have any additional discussions about the consequences to Mr. Noone's driver's license resulting from the guilty plea. A. 5-7. These findings of fact are supported by the record and, therefore, entitled to great deference. *Mangal,* 421 S.C. at 91, 805 S.E.2d at 571.

In determining deficient performance, the PCR court relied on correspondence the Department of Motor Vehicles sent directly to Mr. Noone rather than the accuracy of Mr. Thomason's legal advice to Mr. Noone. A. 5. Mr. Noone's Rule 59(e), SCRCP motion pointed out:

> The only evidence in the record is that Mr. Thomason advised Mr. Noone that his driver's license would be suspended based on a first offense for driving under the influence. The factual finding that Mr. Noone was aware his drivers' license would be suspended [as an habitual traffic offender is not supported by any evidence in the record. Mr. Noone had the right to rely on the advice of counsel. Mr. Thomason's advice to Mr. Noone was deficient.

A. 26.

Mr. Noone's Rule 59(e) motion further noted the PCR judge

> did not consider *Hinson v. State*, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (counsel incorrect advice about parole eligibility warranted granting post-conviction relief); *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) (held that petitioner's testimony that he would not have pled guilty if trial counsel had not misinformed him that he would face a potential life sentence if he proceeded to trial satisfied "prejudice" requirement of ineffective assistance of counsel claim); and *Ray v. State*, 303 S.C. 374, 375, 401 S.E.2d 151, 152 (1991) (held defense counsel ineffective for erroneously advising client "he would be subject to a sentence of life without parole . . . if he went to trial and was convicted of the two armed robbery charges"). Once these cases are considered, the need to grant post-conviction relief is apparent.[4]

[4] At the conclusion of the evidentiary hearing, the PCR judge requested proposed orders. A. 70, line 21 – 36, line 1. Mr. Noone's proposed order cited this caselaw. A. 29-35.

A. 26.

The application of these cases to the facts of this case is a question of law that this Court reviews *de novo*. *Mangal,* 421 S.C. at 91, 805 S.E.2d at 571. Mr. Thomason's advice to Mr. Noone misstated the law regarding the consequences to his driver's license.[5] As *Hinson, Alenxander,* and *Ray* hold, counsel's advice that affirmatively misstates the law "falls below the level of competence reasonably expected of attorneys in criminal cases." *Hinson,* 297 S.C. at 458, 377 S.E.2d at 339.

Mr. Noone had the right to rely on the legal advice of Mr. Thomason, but Mr. Thomason provided incorrect advice. Mr. Noone, accordingly, has established deficient performance under *Strickland.* As will be seen in Question II below, Mr. Noone was prejudiced by this deficient performance.

Question II

Did the PCR court apply the correct standard of review for determining prejudice when it considered the strength of the State's evidence rather than Jerome Noone's testimony that, but for counsel's erroneous advice about the implications of the guilty plea to his driver's license, he would not have pleaded guilty and would have proceeded to trial?

Whether the PCR judge applied the appropriate standard of review for determining prejudice is a question of law that this Court reviews *de novo*. *Mangal,* 421 S.C. at 91, 805 S.E.2d at 571. The order of dismissal concludes Mr. Noone

> has not shown he was prejudiced by accepting the plea offer, as he likely would have been convicted at trial. Counsel testified the video evidence showed [Mr. Noone] behaving erratically, as if intoxicated; [Mr. Noone] gave a spontaneous statement to the officer upon being stopped that he "had too much to drink," and [Mr. Noone] refused to submit to a blood alcohol breath test, which would have been used against [Mr. Noone] at trial.

[5] For a discussion of the relevant suspension periods, *see* fn. 3, *supra* at pp. 3-4.

A. 7.

In his Rule 59(e), SCRCP motion, Mr. Noone pointed out the order of dismissal did "not cite any of the relevant authority for reviewing guilty plea cases." A. 25. Mr. Noone cited *Lee, Frye, Lafler, Hill, Jordan,* and *Thompson.*[6] A. 25. Mr. Noone reminded the PCR court, "The relevant test is whether 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' *Jordan,* 297 S.C. at 54, 374 S.E.2d at 684 (quoting *Hill,* 106 S.Ct. at 370)." A. 25. Mr. Noone additionally argued, "As *Lee* makes clear, 'The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea.' 137 S. Ct. at 1961." A. 25-26. This Court recently "reiterate[d] the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." *Frierson,* at *3.[7]

Lee cautioned, "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences." 137 S. Ct. at 1961. These requirements are met in

[6] At the conclusion of the evidentiary hearing, the PCR judge requested proposed orders. A. 70, line 21 – 36, line 1. Mr. Noone's proposed order cited this caselaw. A. 29-35.

[7] During the evidentiary hearing, the PCR judge overruled Mr. Noone's objection to the State questioning Mr. Opperman about his "assessment of the evidence against Mr. Noone." Counsel noted, "The standard for voluntariness of the guilty plea is whether or not the decision would have been different, not the weight of the evidence." When the PCR judge pointed out Mr. Noone "still [has] to show prejudice," counsel responded, "[T]he prejudice is is [sic] that he wouldn't have entered the guilty plea but for the advice. And you never get into weighing the evidence." A. 58, lines 11-25.

this case. Mr. Noone testified that he would not have pleaded guilty if he had known that he would be declared a habitual offender and that his driver's license would be suspended for five years. His longtime profession of restoring classic automobiles requires him to drive when going to and from work, test driving automobiles, and transporting automobiles to car shows. Mr. Noone explained his "main concern" when meeting Mr. Thomason about the plea offer was the consequences to his driver's license. This testimony was not contested.

Mr. Noone was prejudiced by Mr. Thomason's deficient performance. But for the incorrect legal advice, Mr. Noone would not have pleaded guilty to driving under the influence and would have proceeded to a jury trial. *See Lee, Hill, Frierson, Jordan,* and *Thompson, supra.*

CONCLUSION

For the foregoing reasons, this Court should reverse the PCR court, enter an order vacating Mr. Noone's conviction and sentence, and remand this case to the Court of General Sessions for Anderson County for a new trial.

Respectfully Submitted,

By

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APPEAL FROM ANDERSON COUNTY
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v.

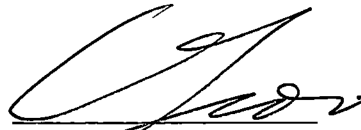
State of South Carolina, ... Respondent.

Certificate of Service

I certify that I have served a copies of the Petition for Writ of *Certiorari* and Appendix on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Lindsey McCallister, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

July 13, 2018



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July 13, 2018

RECEIVED
JUL 17 2018
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Jerome J. Noone, Jr. v. State of South Carolina*
Case No. 2017-CP-04-01012

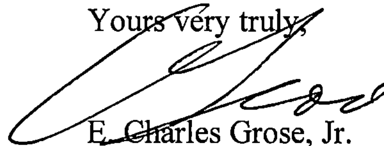
Dear Mr. Shearouse:

Enclosed please find the original and six copies of Mr. Noone's petition for writ of *certiorari* and appendix, along with a certificate of service.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Lindsey McCallister, Esquire