THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Perry H. Gravely, Circuit Court Judge

Circuit Court Case No.: 2014-CP-23-5711
Appellate Case No.: 2016-000260

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S.C. SUPREME COURT

Alejandro Licona Jimeniz, ... Respondent,

v.

State of South Carolina, ... Peititioner.

PETITION FOR WRIT OF CERTIORARI

J. Falkner Wilkes (SC Bar #12893)
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Counsel for Petitioner

PETITION

The issues presented in this case are whether trial counsel was ineffective for failing to challenge the State's enhancement of a drug charge to a second offense based a prior Texas conviction; and whether the Applicant's plea was free, voluntary, and knowing entered when not adequately informed that the charge to which he was pleading would be sentenced as a second offense.

The post conviction relief court's decision overlooks the fact that trial counsel failed to require the state establish a prior Texas conviction by proper proof, as well as proving the elements of such offense prior to allowing the foreign conviction as a basis for a sentence enhancement in the present case. The trial court further overlooked the fact that, as is evident from the record, the trial court never explained or questioned the Applicant about the prior Texas offense, or offered the Applicant an opportunity to speak after the state summarily informed the court that a prior Texas conviction would be the basis for sentence enhancement.

The record shows that the Petitioner's trial attorney failed to obtain documentation from the state of Texas to establish the existence and particulars of the alleged foreign conviction. Defense counsel was aware that the prior offense was a Class A Misdemeanor, subject to a term or confinement not to exceed one year and that Petitioner was adamant that it could not constitute a basis for a sentence enhancement in his case. (App. 62-74). Counsel for Applicant testified that despite the foregoing, he did not undertake to independently obtain the records from the Texas conviction but relied instead on what the solicitor provided him. (App. 52). It appears that all that the solicitor only provided defense counsel with a copy of the Petitioner's "rap sheet". (App. 52). There is no evidence that the state provided, nor did defense counsel attempt to obtain, the charging document or sentencing sheets from the Texas courts. (App. 51-52). Nor is there

evidence that the defendant's counsel offered any evidence as to the elements of the Texas offense to support a challenge to the applicability of South Carolina's sentencing enhancement provision. During the Petitioner's guilty plea, only after the Applicant had been asked questions concerning the facts underlying the offense and the plea judge found a substantial factual basis for the plea, did the solicitor announce that the Applicant had a prior Texas conviction that would support a sentence enhancement. (App. 71). After the solicitor's announcement, the Applicant was never given an opportunity to respond personally, and trial counsel failed to raise any objection or make any challenge to the solicitor's statement. (App. 71). At no time during the plea did the court ever questioned the Applicant about the prior Texas offense or adequately inform him that it would constitute a basis for sentencing as a second offense.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *U.S. Const. amend. VI*; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164,

166 (1998). Here the Petitioner testified that, but for counsel's failure's, he would not have pled guilty. (App. 34-35).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge 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). In the Petitioner's case there is insufficient evidence to uphold the PCR court's decision that trial counsel was effective, or that the Petitioner's plea was free, voluntary, and knowingly entered.

Section 44-53-470 "Second or subsequent offense" defined

> (A) An offense is considered a second or subsequent offense if:
>
> (1) for an offense involving marijuana pursuant to the provisions of this article, the offender has been convicted within the previous five years of a first violation of a marijuana possession provision of this article or of another state or federal statute relating to marijuana possession;
>
> (2) for an offense involving marijuana pursuant to the provisions of this article, the offender has at any time been convicted of a first, second, or subsequent violation of a marijuana offense provision of this article or of another state or federal statute relating to marijuana offenses, except a first violation of a marijuana possession provision of this article or of another state or federal statute relating to marijuana offenses;

(3) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs; and

(4) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.

(B) If a person is sentenced to confinement as the result of a conviction pursuant to this article, the time period specified in this section begins on the date of the conviction or on the date the person is released from confinement imposed for the conviction, whichever is later.

HISTORY: 1962 Code Section 32-1510.59; 1971 (57) 800; 2005 Act No. 127, Section 6, eff June 7, 2005; 2010 Act No. 273, Section 41, eff June 2, 2010.

Petitioner testified that his 2008 Texas conviction was not based on actual possession but only for intent to possess, and was therefore only a Class A Misdemeanor in the state of Texas:

Sec. 12.21 Class a Misdemeanor.

SUBCHAPTER B. ORDINARY MISDEMEANOR PUNISHMENTS
Sec. 12.21. CLASS A MISDEMEANOR. An individual adjudged guilty of a Class A misdemeanor shall be punished by:
(1) a fine not to exceed $4,000;
(2) confinement in jail for a term not to exceed one year; or
(3) both such fine and confinement.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1991, 72nd Leg., ch. 108, Sec. 1, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

SC Code 44-53-370 Prohibited acts a; penalties (South Carolina Code of Laws)

(a) Except as authorized by this article it shall be unlawful for any person:
(1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;

.....

(d) two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars;
(e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, 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:

.....

(2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
(a) ten grams or more, but less than twenty-eight grams:
1. for a first offense, a term of imprisonment of not less than three years nor more than ten years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars;
2. for a second offense, a term of imprisonment of not less than five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars;

.....

(d) two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars;

In Robinson v. State, 387 S.C. 568, 693 S.E.2d 402 (S.C., 2010) the court held that PWID Crack Cocaine and Possession of Marijuana could enhance trafficking of crack cocaine. It also held that prior convictions for possession of cocaine could enhance trafficking of crack cocaine. However,

in the present case, Petitioner testified that his offense did not involve actual possession. Rather it involved only the unlawful intent to possess. (App. 30-31). Despite Petitioner's adamant position that the prior offense could not be considered as an enhancement, trial counsel failed to investigate or challenge whether the Applicant had a prior conviction for a drug offense in Texas, and if so, whether the elements of the offense under Texas law would allow for enhancement under South Carolina law. (App. 30-31; 51-52).

Here trial counsel was ineffective in failing to properly investigate the Texas offense. A proper investigation would have allowed counsel to show that the prior offense was only a misdemeanor charge for which the Petitioner was sentenced to time served. It would also have allowed defense counsel to show that factually, the Applicant's Texas conviction was not based on the actual possession of drugs, but rather just an intent to possess drugs. (App. 30-31). Applicant maintains that this would have had an effect on the charge and sentencing in the case, including the application of South Carolina's enhancement provisions.

II. PLEA NOT FREELY AND VOLUNTARILY ENTERED.

Applicant testified at the PCR that he felt pressured into entering a guilty plea. Applicant testified that defense counsel told him that there was a lot of racism in South Carolina, and that the Applicant could get the maximum sentence of twenty-five years. (App. 34). Applicant further testified that defense counsel never let him review his discovery information, and that had he been able to review that information he would not have pled guilty. (App. 34). Although the Applicant testified that his attorney mailed him the discovery material, from the Applicant's PCR testimony it appears that this was only after the guilty plea. (App. 34-35). Here, the Applicant's plea can not

be freely and intelligently entered where defense counsel never provided, or adequately reviewed, any of the discovery material with the Applicant prior to the plea.

Applicant further testified that at the time of the plea he wasn't aware that he would be pleading guilty to a second offense. He believed that, because his Texas conviction was merely a misdemeanor, that he would be pleading guilty and sentenced to a first offense. (App. 43). During the plea the trial court never advised the Applicant that the offense for which he was pleading guilty would be treated as a second offense, or that he would be sentenced under South Carolina's enhancement provision. (App. 24-37).

A guilty plea must be an informed and intelligent decision. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea is valid if it represents a voluntary and intelligent choice among alternatives available to a defendant. *Id.* Before accepting a guilty plea, the trial court must give the defendant an adequate warning of the consequences of his plea, which should include an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975). In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), this Court also acknowledged that the "court's warning should include an explanation of the defendant's waiver of constitutional rights and a realistic picture of all sentencing possibilities." *Id.* at 598, 211 S.E.2d at 891. To ensure that the defendant understands, the trial judge usually questions the defendant about the facts surrounding the crime and the punishment which could be imposed. *See, e.g.*, State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Here the trial court never inquired of, or explained to Applicant, that the conviction would be treated as a second offense.

Additionally, although the Applicant may have written his name on the sentencing sheet, there is no indication that the sentencing sheet was translated into Spanish for him.[1] During the guilty plea proceedings, the trial court never made any inquiry of the Applicant as to prior offenses. Nor was the Applicant offered an opportunity to respond after the solicitor stated that the present charge was being treated as a second offense due to a prior Texas conviction. (App. 71). Trial counsel failed to challenge the solicitor's statement that Applicant had a prior possession of cocaine conviction, or that any prior conviction would constitute a basis for enhancement under South Carolina law. In light of the Applicant's testimony at the PCR hearing, as well as the record from Applicant's guilty plea, it is clear that the Applicant was never adequately informed that the charge to which he was pleading guilty would be treated as a second offense. Applicant's plea was therefore not freely, voluntarily, and intelligently entered.

Conclusion

Based on the foregoing the petition should be granted and the decision of the circuit court reversed.

Respectfully submitted,

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(864) 282-1292
Counsel for Petitioner

November 7, 2016.

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[1]The Applicant could not speak English. Counsel testified he had to use a translator to communicate with the Applicant and the Applicant spoke through an interpreter at the both the PCR and guilty plea proceedings.

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State of South Carolina,. . . . . Peititioner

CERTIFICATE

I certify that the Appendix is in compliance with Supreme Court Order 2014-04-15-02.

Respectfully submitted,

J. Falkner Wilkes (SC Bar #12893)
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Counsel for Appellant/Petitioner

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CERTIFICATE

I certify that on November 7, 2016, I served the Peitioner's PETITION FOR WRIT OF CERTIORARI, APPENDIX, and CERTIFICATE OF SERVICE on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, as indicated below:

John Benjamin Aplin, Esq.
Office of the Attorney General
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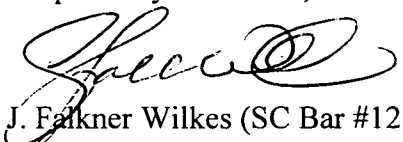
Columbia, SC 29211

Respectfully submitted,



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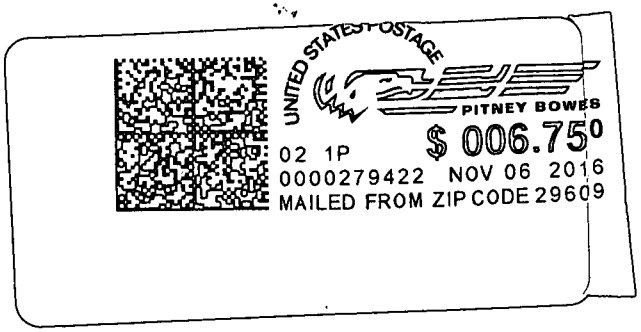

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