

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-002054

SHERMAN MYERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Did the PCR court properly find Petitioner failed to satisfy his burden of proving Plea Counsel did not explain the elements of burglary where ample evidence demonstrates Plea Counsel discussed the elements of burglary with Petitioner to include the element of "entering a dwelling," and notwithstanding, there was ample evidence including witness statements and Petitioner's own confession that Petitioner stole a power washer from *inside* the victim's attached garage?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. During its May 2011 term, the Beaufort County Grand Jury indicted Petitioner for first-degree burglary (2013-GS-07-0925). Jessica M. Saxon, Esquire (“Plea Counsel”), represented Petitioner. Assistant Solicitor Julie Kate Keeney prosecuted the case. On November 18, 2014, Petitioner pled guilty as indicted before the Honorable Thomas W. Cooper, Jr. Pursuant to the State’s recommendation, Judge Cooper sentenced Petitioner to imprisonment for the mandatory minimum of fifteen years for first-degree burglary. Petitioner did not appeal from his guilty plea or sentence.

On April 6, 2015, Petitioner filed an application for post-conviction relief. The State made its return on February 3, 2016. An evidentiary hearing into the matter was convened on February 13, 2017, before the Honorable R. Scott Sprouse. Petitioner was present at the hearing and represented by James K. Falk, Esquire. Assistant Attorney General Ruston W. Neely represented the State. Judge Sprouse denied and dismissed the application with prejudice by an order of dismissal filed September 22, 2017.

Petitioner filed a timely notice of appeal on September 30, 2017. Petitioner then filed a petition for writ of certiorari on May 29, 2018. This return follows.

STATEMENT OF THE FACTS

Petitioner’s charge resulted from an incident on the afternoon of March 30, 2011, in which Petitioner stole a power washer from inside the garage of the Victim’s home. App. p. 9, ll. 5-13. Petitioner had five prior convictions for burglary of various degrees, and was therefore charged with first-degree burglary. App. p. 9, l. 16 – p. 10, l. 15.

Petitioner confessed twice to the crime before he pled guilty. App. p. 9, l. 16. Petitioner was also identified by the Victim and a second witness out of a six-person lineup. App. p. 9, ll. 14-18.

As to the location of the power washer, in a taped interview with police, Petitioner told law enforcement the power washer was located in the garage, which was attached to the home with a door from the garage into the home. App. p. 55, ll. 15-20. Furthermore, Petitioner's codefendant ("Codefendant") as well as Victim also placed the power washer inside the garage. App. p. 55, ll. 15-17; p. 58, ll. 13-18.

RELEVANT PCR HEARING TESTIMONY

At the PCR hearing convened on February 13, 2017, the court heard testimony from Petitioner as well as Plea Counsel. After observing the witnesses, the PCR court found Plea Counsel's testimony to be credible and persuasive. App. p. 65. By contrast, the PCR court found Petitioner's testimony lacked credibility. App. p. 65.

Petitioner

Petitioner testified he probably had "at most" three conversations with Plea Counsel before pleading guilty. App. p. 42, ll. 14-16. Petitioner testified he did not fully understand about "the first-degree," because he never entered the victim's garage. App. p. 42, ll. 17-24. However, Petitioner did recall going through the police reports with Plea Counsel and the reports stated Petitioner entered the garage of the residence. App. p. 43, ll. 2-9. Despite his allegation that Plea Counsel did not explain the "entering a dwelling" element of first-degree burglary, Petitioner nevertheless testified it was "fully" his understanding that he had to go inside the plane of the house to be charged with burglary. App. p. 43, ll. 10-16. However, Petitioner contradicted this statement later on direct examination when he claimed he did not have an understanding that the

charge would be different if the stolen item was outside the house rather than inside the house. App. p. 45, ll. 8-15.

Petitioner recalled a jury had already been picked and decided to plead guilty after pretrial motions. App. p. 46, l. 13 – p. 47, l. 2. Petitioner testified he was not satisfied “to the fullest” with Plea Counsel, although he acknowledged the guilty plea transcript indicates he told the plea judge he was satisfied with her services and she had done everything asked of her. App. p. 47, l. 24 – p. 49, l. 3.

Plea Counsel

Despite Petitioner’s testimony that Plea Counsel spoke with him “at most” three times, Plea Counsel testified she “definitely” spoke with Petitioner more than three times as she represented him for approximately a year and a half and saw him “quite a bit.” App. p. 50, ll. 14-19; p. 54, ll. 4-13. Plea Counsel recalled Petitioner was actually on probation for a burglary in Richland County while they were preparing for trial. App. p. 52, ll. 3-19. Plea Counsel characterized the case against Petitioner as a strong case for the State. App. p. 57, ll. 15-18.

Plea Counsel testified she went through the elements of first-degree, second-degree, and third-degree burglary with Petitioner. App. p. 55, ll. 8-10. Nevertheless, Petitioner was still very adamant and upset about the fact he did not actually get away with the power washer since it fell out of his truck when he was driving away, but she explained to Petitioner the elements and how he was charged with first-degree burglary due to his prior convictions. App. p. 55, l. 10 – p. 56, l. 5.

As to whether the stolen power washer was located inside or outside of the garage, Plea Counsel explained that Petitioner himself as well as his codefendant stated in interviews that the power washer was *in* the garage, which was attached to the home with a door from the garage to

the home. App. p. 55, ll. 15-19 (emphasis added). Plea Counsel also explained the victim placed the power washer in the garage. App. p. 55, ll. 15-17. Plea Counsel explained they discussed the fact that the power washer was in the garage attached to the home and therefore in a portion of the dwelling. App. p. 55, ll. 20-24. Once more, Plea Counsel reaffirmed two eyewitnesses (Petitioner and codefendant) as well as the victim placed the power washer in the garage. App. p. 58, ll. 13-18.

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the PCR court's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; 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 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, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s 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, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not “within the competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56. Further, “[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.” McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” Id. at 771. Furthermore, “A guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). “In considering an allegation on PCR that a guilty plea

was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.” *Id.* at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

ARGUMENT

The PCR court properly found Petitioner failed to satisfy his burden of proving Plea Counsel did not explain the elements and nature of burglary where ample evidence demonstrates Plea Counsel discussed the nature and elements of burglary with Petitioner to include the element of “entering a dwelling,” and notwithstanding, there was ample evidence including witness statements and Petitioner’s own confession that he stole a power washer from *inside* the victim’s attached garage.

Petitioner argues Plea Counsel was ineffective for failing to explain the elements and nature of first-degree burglary, specifically the element of “entering a dwelling,” before he pled guilty. However, there is ample probative evidence throughout the record, including Petitioner’s own statements at his guilty plea, supporting the PCR court’s finding that Plea Counsel did in fact explain the elements and nature of Petitioner’s charge before his guilty plea and Petitioner understood the charge. Moreover, while Petitioner now alleges he actually took the power washer from outside the garage and was not advised that “entering a dwelling” was an element of burglary, the record refutes this allegation as ample evidence and Petitioner’s own confession placed the power washer *inside* the garage. App. p. 55, l. 10 – p. 56, l. 5; p. 58, ll. 13-18 (emphasis added). Therefore, the PCR court correctly found Petitioner failed to carry his burden of proving Plea Counsel was deficient or that he was prejudiced by any alleged deficiency, and certiorari should be denied.

First, it should be recognized the PCR court found the testimony of Plea Counsel to be credible and persuasive. By contrast, the PCR court found Petitioner’s testimony to lack

credibility. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)

i. The record reveals Petitioner was well-informed of the elements of burglary.

Petitioner's allegation that Plea Counsel failed to advise him of the elements and nature of first-degree burglary is meritless and thoroughly refuted by the record. As the PCR court properly found, the record clearly reflects Petitioner's plea was entered knowingly, intelligently, and voluntarily, and Petitioner clearly understood the State's allegation that he went *into* the garage when he pled guilty. App. p. 67.

Plea Counsel's testimony at the PCR hearing, which was found to be credible and persuasive by the PCR court, revealed she spoke with Petitioner frequently and went over the elements of burglary in the various degrees. App. p. 55, l. 8 – p. 56, l. 5.

A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, [and the entering is accompanied by an aggravating circumstance.] S.C. Code § 16-11-311(A)

With respect to the crimes of burglary ... any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant ... shall be deemed a dwelling house, and or such a dwelling house or of any other dwelling house all house, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels. S.C. Code § 16-11-10

Plea Counsel recalled discussing with Petitioner how the power washer was taken from *inside* the garage, which was attached to the home and therefore considered a portion of the dwelling. App. p. 55, ll. 10-24 (emphasis added). This is corroborated by Plea Counsel's representation at the guilty plea hearing that she had advised Petitioner of the nature of the charge. App. p. 4, ll.

19-25. Moreover, Petitioner told the plea judge he was satisfied with Plea Counsel, he had enough time to speak with her, and had understood all those talks. App. p. 8, ll. 12-22. At the PCR hearing, Petitioner actually at one point conceded that he understood he had to go inside the garage to constitute a charge of burglary. App. p. 43, ll. 10-16. Only when questioned further by his PCR Counsel did Petitioner finally testify that he did not have an understanding of how the circumstances would have been different if the power washer he stole would have been taken from outside the garage. App. p. 45, ll. 8-15. Certainly, the PCR court's finding that Petitioner was fully advised by Plea Counsel and understood the charge against him was supported by the credible testimony of Plea Counsel as well as Petitioner's own statements at his plea hearing.

While there is no evidence to indicate Plea Counsel failed to adequately advise Petitioner regarding the elements of first-degree burglary, the PCR court properly found any alleged deficiency in this regard would have been cured by the judge's colloquy at Petitioner's guilty plea hearing. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing should be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (holding any possible misconceptions on applicant's part were cured by the colloquy during the actual guilty plea hearing). At Petitioner's guilty plea hearing, the plea judge read Petitioner's indictment as follows:

"The indictment says that you did, here in Beaufort County, on or about March the 30th of 2011, enter a dwelling of [Victim] on Vaux Road, without his consent, and with the intent to commit a crime while you were there. And that you have at least two prior convictions of burglary on your record, making this a burglary in the first degree, because of your prior record. Do you understand that?" App. p. 7, ll. 16-23.

Petitioner then responded he understood these facts alleged against him and he wanted to plead guilty. App. p. 7, l. 24 – p. 8, l. 1. In addition to those facts being read by the plea judge, Petitioner was also present when the Solicitor recited the following facts:

“...The defendant went to the victim’s home and took a – on the side of the victim’s garage, and took a power washer that was sitting *in* the garage. The defendant put it in the back of the car he was driving.” App. p. 9, ll. 9-13 (emphasis added).

Therefore, the PCR court was on firm ground to find, even notwithstanding Plea Counsel’s advice, Petitioner fully understood the charge against him and voluntarily pled guilty based on the facts that he *entered* the victim’s garage and took the power washer which was located *inside* the garage.

ii. Regardless, all evidence shows Petitioner took the washer from *inside* the garage.

Notwithstanding the fact Petitioner was well-advised of the elements and nature of first-degree burglary and the element at issue of “entering a dwelling,” the fact remains all evidence indicates the power washer was stolen from inside, not outside, of the attached garage. Plea Counsel even recalled discussing with Petitioner how the power washer was located *in* the attached garage, which was part of the victim’s dwelling. App. p. 55, ll. 15-24 (emphasis added). This is consistent with the evidence against Petitioner. In fact, Petitioner twice confessed to the burglary. App. p. 11, ll. 14-18. In one of his recorded interviews with law enforcement, Petitioner himself stated the power washer was located in the garage. App. p. 55, ll. 15-24; p. 58, ll. 13-18. This is further corroborated by his codefendant’s statement to law enforcement that the power washer was taken from inside the garage. App. p. 55, ll. 15-19; p. 58, ll. 13-16. Furthermore, the victim also placed the power washer inside the garage. App. p. 55, ll. 15-19; p. 58, ll. 13-15. The police reports, which Plea Counsel reviewed with Petitioner prior to his plea,

also indicated the power washer was stolen by Petitioner who entered the garage. App. p. 42, l. 25 – p. 43, l. 9.

In fact, a review of the record reveals the PCR hearing is the first occasion at which Petitioner began to claim he took the power washer from the outside and not inside of the garage. App. p. 43, ll. 4-9. All witnesses, including Petitioner until now, indicated he stole the victim's power washer from inside the victim's attached garage. There is no evidence in the record to the contrary, only Petitioner's testimony from the PCR hearing which the PCR court found to lack credibility. App. p. 65. Petitioner cannot establish prejudice from any alleged deficiency in advisement regarding the "entering a dwelling" element of burglary when all evidence including his own confession reveals he did in fact enter the dwelling to steal the power washer.

As previously noted, the PCR court properly found Petitioner failed to satisfy his burden of proving Plea Counsel did not adequately advise him regarding his burglary charge or that he was prejudiced from the alleged deficiency. Rather, the record reveals Petitioner was well-advised of the elements and nature of the first-degree burglary charge against him by Plea Counsel and even further reinforced at his guilty plea hearing. Notwithstanding, the record refutes Petitioner's current claim that he only took the power washer from outside the victim's garage, and this negates any potential prejudice from the unsupported allegation that Plea Counsel did not advise him regarding the "entering a dwelling" element of burglary. Therefore, there is ample probative evidence to support the PCR court's finding that Petitioner has not satisfied his burden of proving he is entitled to post-conviction relief.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

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_____, 2018

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SHERMAN MYERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.


PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 16 day of October, 2018.


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STATE OF SOUTH CAROLINA

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SHERMAN MYERS,

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STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

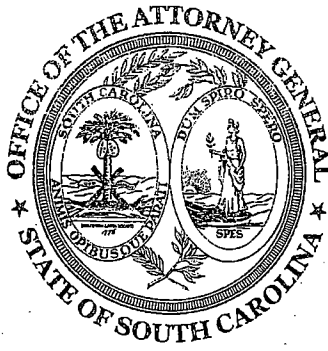
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the Interagency Mail:

**Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211**

This 16th day of October, 2018



CARSON KIRK
Legal Assistant



RECEIVED
OCT 16 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 16, 2018

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

Re: Sherman Myers v. State of South Carolina
Appellate Case No. 2017-002054
Lower Court Case No. 2015-CP-07-0859

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar No. 103272

CS/ck
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)