

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
William Seals, Circuit Court Judge

Appellate Case No. 2017-002294

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NOV 05 2018

S.C. SUPREME COURT

ANTAVIUS GADSDEN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly find that Petitioner failed to establish counsel was constitutionally ineffective when counsel guaranteed that if Petitioner pled guilty to strong arm robbery and assault and battery in the second degree he would receive probation, and where Petitioner who relied on plea counsel's guarantee, received a ten year sentence for strong arm robbery and three year sentence for assault and battery in the second degree?

STATEMENT OF THE CASE

On March 10, 2014, Petitioner was indicted by the Charleston County Grand Jury for Assault and Battery in the second degree and Strong-Arm Robbery. App. 84 – 88. On May 5, 2014, in front of the Honorable R. Markley Dennis, Petitioner, allegedly under the impression he would receive probation, pled guilty to strong-arm robbery and assault and battery in the second degree. App. 1. Lindsey McClain Byrd represented the state and Robert Howe represented Petitioner. Id.

These charges arise from the attack and robbery of a female victim at a storage facility in Charleston County on November 16, 2013. Petitioner spent the morning monitoring the facility and eventually approached the victim, struck her in the face, told her to shut up, and threatened to kill her. The victim fell to the ground and Petitioner continued to strike the victim in the face and began choking her with both hands until she nearly lost consciousness. Petitioner then went through the victim's pockets and purse, eventually fleeing with her iPhone, cash, and credit cards. The victim provided a detailed description of Petitioner, including a tattoo on his forearm, and identified him from a six-pack lineup. Petitioner was also identified on surveillance footage from the storage facility and when confronted with the video, acknowledged it was him. (Plea Tr. 5 – 7, 9).

The court accepted Petitioner's guilty plea and sentenced him to ten years imprisonment for strong arm robbery and three years' imprisonment for assault and battery in the second degree. App. 18, ll. 3 – 8; 19, ll. 1 – 5. Petitioner's three year sentence was suspended on five years' probation. App. 19, ll. 1 – 5.

Petitioner filed an application for post-conviction relief on January 9, 2015, which alleged ineffective assistance of counsel and involuntary guilty plea. App. 22-28. Specifically,

Applicant alleged that counsel failed to appeal the court's decision and counsel failed to abide by the plea agreement that he discussed with client. App. 24. The State filed its return on July 28, 2015, and an evidentiary hearing was held on January 12, 2017. App. 29 – 33; App. 35.

Petitioner's PCR hearing was held in front of the Honorable William Seals. App. 35. Rodney Davis represented Petitioner Alice Olive represented the state. Id. Judge Seals filed an order of dismissal on September 14, 2017 that stated Petitioner failed to carry his burden of proof regarding any of his allegations of ineffective assistance of counsel. App. 74 – 82. Specifically, Judge Seals found that Applicant failed to present any testimony at the hearing that he wanted counsel to file an appeal of his guilty plea. Also, Judge Seals found that the allegation that counsel failed to abide by the plea agreement was refuted by the plea colloquy. Applicant stated that he remembered the plea court telling him that could receive up to eighteen years for the two offenses.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly denied post-conviction relief where Petitioner failed to establish counsel was constitutionally ineffective for advising him to accept a favorable plea offer from the State and Petitioner knowingly, voluntarily, and intelligently elected to forgo trial and enter guilty pleas.

Petitioner asserts counsel was constitutionally ineffective for guaranteeing that if Petitioner pled guilty to strong arm robbery and assault and battery in the second degree he would receive probation, and where Petitioner, who relied on plea counsel's guarantee, received a ten year sentence for strong arm robbery and three years suspended to five years probation for assault and battery in the second degree. However, the post-conviction relief court properly denied Petitioner post-conviction relief, as Petitioner knowingly, voluntarily, and intelligently entered his guilty plea, and failed to establish that counsel's performance was constitutionally ineffective. This Court should deny certiorari.

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 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an 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 Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] 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. First, the Petitioner must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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). The Petitioner 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 Petitioner 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, an Petitioner 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).

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; 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, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of

cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

In the present case, Petitioner knowingly, voluntarily, and intelligently entered guilty pleas to strong arm robbery and assault and battery in the second degree after admitting his guilt and informing the court he knew his constitutional rights and wished to voluntarily waive these rights to enter his guilty pleas. (Plea Tr. p. 4 – 5). Petitioner, during his plea, indicated to the judge that his lawyer explained to him the charges he was pleading to and the potential sentence he could be receiving for each offense. Petitioner answered affirmatively that he understood the charges and that he could be sentenced to the maximum. (Tr. p. 2 lines 2 – 25, p. 3 lines 1 – 9). Petitioner also stated that he was satisfied with his lawyer. (Tr. p. 3 lines 11 – 13). After hearing the judge’s colloquy on giving up his constitutional rights (including the right to a jury trial) in order to testify, Petitioner indicated that he did and that he understood those rights. (Tr. p. 4 lines 17 – 25, p. 5 lines 1 – 8). Importantly, when asked if any promises were made to Petitioner to get him to plead guilty he responded: “No, sir.” (Tr. p. 5 line 12). Petitioner also affirmed to the court that the decision to plead guilty was his and that he was in fact guilty. (Tr. p. 5 lines 13 – 17). After the Solicitor recited the facts for the court, the Petitioner agreed to them when asked by the court. (Tr. p. 5-7, p. 8 lines 1 – 17). Most importantly, when asked by the court if he was entering the plea freely and voluntarily the Petitioner responded: “Yes, sir.” (Tr. p. 8 line 22 – 25).

Despite entering these pleas knowingly, voluntarily, and intelligently, Petitioner now asserts he is entitled to post-conviction relief as to both the strong arm robbery and the assault and battery in the second degree, because his attorney was constitutionally ineffective for advising him to plead guilty where he alleges he was promised that he would receive probation

as his sentence. However, the post-conviction relief court properly denied relief, as Petitioner failed to establish that counsel was either deficient in advising Petitioner to plead guilty or that he was prejudiced as a result of this purported deficiency.

Initially, Petitioner cannot establish that plea counsel's performance was constitutionally deficient for securing a favorable plea deal. The Petitioner's major allegation is that he would not have plead guilty were it not for counsel allegedly guaranteeing him that he would get probation. As previously noted, the Petitioner was fully aware that he could be facing the maximum possible sentence on both of the original charges if he did not plead guilty. The Petitioner was facing a high level of potential exposure, considering the maximum for the two original charges was twenty-five years. Petitioner's attorney secured a plea deal of ten years with five years' probation consecutive, significantly reducing Petitioner's potential risk. Petitioner's attorney also argued for probation, at length, during the mitigation portion of Petitioner's guilty plea. Respondent argues that securing a guilty plea that significantly reduces Petitioner's exposure is certainly not constitutionally deficient representation. The allegation was also directly refuted by the record, which showed that Applicant was aware that there was no plea agreement in place and that he never asked counsel to appeal his guilty plea.

Additionally, Petitioner has failed to establish any prejudice for counsel's purported deficiency, as the Petitioner has failed to show that "there was a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52 (1985). The State's evidence in this case was extraordinarily strong: the victim provided a description to police of the Petitioner down to the tattoo on his arm, victim identified Petitioner from a six-pack photo lineup, and the Petitioner admitted to police that he was the person on the surveillance video assaulting the victim. Considering the State's

evidence against his client and the potential exposure, it is a reasonable strategy to pursue a guilty plea that would reduce the risk of the Petitioner being convicted and sentenced to the maximum twenty-five year sentence. As Petitioner failed to establish he would not have pled guilty but for counsel's advice, he failed to establish any prejudice. Hill v. Lockhart, 474 U.S. 52 (1985) (holding that with respect to guilty plea counsel, an Petitioner 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). Petitioner has failed to establish any prejudice, and therefore, this court should deny certiorari.

Ultimately, Petitioner made a knowing, voluntary, and intelligent decision to plead guilty to strong arm robbery and second degree assault and battery. Counsel's performance was in accordance with professional standards and Petitioner has failed to establish any prejudice. Therefore, the post-conviction relief court properly denied relief. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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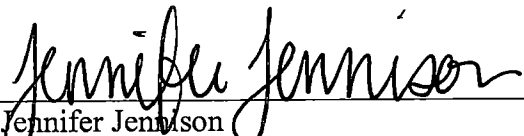
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 5th day of November, 2018.



Jennifer Jennison
Legal Assistant for Respondent



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ALAN WILSON
ATTORNEY GENERAL

November 5, 2018

RECEIVED
NOV 05 2018
S.C. SUPREME COURT

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

RE: Antavius Gadsden v. State of South Carolina
Appellate Case No.: 2017-002294

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin Limbaugh

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jaj
Enclosures

cc: Victor R. Seeger, Esquire
Victim Advocacy Division