STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II., Circuit Court Judge

Appellate Case No. 2018-000883

JONQUAY MCCOMBS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF THE ISSUES

I. Did the post-conviction relief court properly determined Petitioner's guilty plea was voluntarily, knowingly, and intelligently entered because the lower court conducted an extensive colloquy with Petitioner and Petitioner signed a detailed plea waiver form at the time of his guilty plea?

II. Did the post-conviction relief court properly determined counsel was not ineffective for failing to move to suppress evidence recovered during a search of Petitioner's vehicle because Petitioner consented to the search and law enforcement had probable cause to search his vehicle based on Petitioner's admission there was crack cocaine in the vehicle?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. During its July 2016 term, the York County Grand Jury indicted Petitioner for first-degree assault and battery (2016-GS-461942), unlawful carrying of a pistol (2016-GS-46-1943), and possession with intent to distribute (PWID) crack (third offense) (2016-GS-46-1944). Assistant Public Defender Jessica Russo of the Sixteenth Circuit Public Defender's Office represented Petitioner. Assistant Solicitor Daniel Porter of the Sixteenth Circuit Solicitor's Office prosecuted the case. On July 15, 2016, Petitioner pled guilty before the Honorable John C. Hayes, III, to first-degree assault and battery, unlawful carrying of a pistol, and PWID crack second offense as a lesser included offense of PWID crack third offense. Pursuant to negotiations entered into by Petitioner and the State, Judge Hayes sentenced to imprisonment for ten years for PWID crack second offense, ten years for first-degree assault and battery, and one year for unlawful carrying of a pistol. The sentences were to run concurrently. Petitioner did not appeal his guilty plea.

Petitioner filed his application for post-conviction relief on May 31, 2017, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
2. "Applicant's plea was involuntary and made in ignorance"
3. Counsel was ineffective for failing to adequately investigate and consequently advise Applicant on the availability of relevant defenses or opportunities to suppress evidence, rendering Applicant's guilty plea not knowingly or intelligently made.
    a. A more thorough review of the discovery would have revealed that grounds existed to challenge the searches of Applicant's vehicle on October 16, 2015 and February 6, 2016. Had Applicant been fully advised on the nature and strength of the State's evidence, as well as the opportunity to suppress the evidence seized from two illegal searches, he would not have pled guilty and instead would have proceeded to trial.

b. Applicant learned that another individual housed in the same jail for murder, who looked very much like Applicant, was responsible for the gunshots that led to Applicant's arrest for assault and battery first. Applicant had communicated this to counsel but counsel failed to investigate. Had Applicant known that evidence may have existed to support a third-party defense at trial, he would not have pleaded guilty and instead have proceeded to trial.

4. Counsel failed to spend adequate time with Applicant explaining the nature of the charges, the evidence against him, and the possible penalties, thus rendering Applicant's guilty plea not knowingly or intelligently made.

    a. At the time of his guilty plea, Applicant did not understand the elements to each charge. Counsel had also failed to thoroughly review all of the State's evidence with him. Counsel also failed to discuss with Applicant the full range of possible sentences.

    b. Particularly, Counsel had advised Applicant that he would only have to serve three (3) to six and half (6.5) years in prison. Had Applicant known that he would be sentenced to upwards of ten (10) years, he would not have pleaded guilty and instead would have proceeded to trial.

An evidentiary hearing into the matter was convened on February 1, 2018, at the Moss Justice Center before the Honorable J. Mark Hayes, II. Petitioner was present at the hearing and represented by William Yarborough, III, Esquire. Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Assistant Public Defender Jessica Russo also testified. By order filed May 3, 2018, Judge Hayes denied Petitioner's application in its entirety finding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant his post-conviction relief application. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

On May 11, 2016, officers with the York Police Department responded to a residence on Mighty Joe Trail. (App. 89.) The victim reported Petitioner fired multiple shots hitting his vehicle and placing the victim in fear of imminent serious bodily harm. (App. 89.) Officers recovered bullet casings and took photographs of the victim's vehicle. (App. 89.) This investigation led to Petitioner being indicted for the assault and battery first degree.

On October 16, 2015, a concerned citizen called police after hearing gunshots on Railroad Avenue. A bystander identified the vehicle Petitioner was driving as being the vehicle from which the bullets were fired. (App. 89.) Officers stopped Petitioner's vehicle and, after smelling marijuana, searched the vehicle and found a handgun concealed under the driver's seat. (App. 89.) Petitioner was placed under arrest for unlawful carry at that time. (App. 89.)

On February 6, 2016, officers with the York Police Department responded to BayTree Apartments after receiving a 911 call. (App. 89.) While knocking on the residence where the 911 call originated, officers smelled marijuana coming from a neighboring apartment and initiated contact with Lashawn Rhodes. (App. 89-90.) Officers asked to speak to Petitioner and he came to the door. (App. 90.) During the conversation, Petitioner admitted his vehicle was illegally parked outside of the apartment. (App. 90.) Petitioner continued to talk to law enforcement and admitted there was crack cocaine in his vehicle. (App. 90.) Officers conducted a search "due to his permission and the probable cause of his statement" and found two grams of crack cocaine in the car as well as $390. (App. 90.) Officer seized the money and vehicle at that time. (App. 90.)

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. Id. 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] 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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. **The post-conviction relief court properly determined Petitioner's guilty plea was voluntarily, knowingly, and intelligently entered because the lower court conducted an extensive colloquy with Petitioner and Petitioner signed a detailed plea waiver form at the time of his guilty plea.**

Petitioner claims his guilty plea was not knowingly or voluntarily entered because Counsel failed to adequately investigate his PWID crack cocaine charge and failed move to suppress the evidence supporting that charge. However, the plea record provides clear evidence Petitioner understood his constitutional rights, the charges he was pleading guilty to, and the consequences of entering his guilty plea. The plea court conducted an extensive colloquy with Petitioner to ensure he was satisfied with his attorney, understood the charges against him, and knew of the ten year negotiated sentence he would receive if his guilty plea was accepted. During the exchange with the plea judge, Petitioner never wavered from his decision to plead guilty. Additionally, Petitioner initialed and signed a plea waiver form, which detailed the plea agreement and negotiated sentence. It is clear from the record and the plea waiver form Petitioner understood exactly what he was pleading guilty to and was fully aware of the negotiated sentence he would serve. Petitioner has failed to provide any substantive grounds showing how his guilty plea was not knowingly, voluntarily, or intelligently entered. The post-conviction relief court properly found Petitioner's guilty plea was freely, voluntarily, and intelligently made and, consequently, this Court should deny certiorari.

"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, 423 S.E.2d 704 (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"). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969).

Here, Petitioner not only had a thorough colloquy with the plea court, but has also initialed and signed an itemized plea waiver form that painstakingly spells out Petitioner's constitutional rights (including his right to a trial), his charges, and the negotiated sentence Petitioner would receive if the court accepted his plea. Additionally, Counsel testified at the post-conviction relief hearing that Petitioner, "was happy with the ten [years] but was unhappy with having to plead to the A&B first." (App. 72.) Counsel further testified she would have taken the case to trial had Petitioner requested a trial, however, Petitioner told her "I don't want to take this trial[.]" (App. 75.) Petitioner was aware if he proceeded to trial he was eligible for life without the possibility of parole due to his current charges and criminal history. By taking advantage of this plea deal, Petitioner was able to avoid a possible life sentence at trial. It is evident from the colloquy during the plea hearing, the plea waiver form, and Counsel's credible testimony during the post-conviction relief hearing that Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered. The post-conviction relief court properly denied Petitioner relief on this allegation and this Court should deny certiorari.

II. **The post-conviction relief court properly determined counsel was not ineffective for failing to move to suppress evidence recovered during a search of Petitioner's vehicle because Petitioner consented to the search and law enforcement had probable cause to search his vehicle based on Petitioner's admission there was crack cocaine in the vehicle.**

Petitioner alleges Counsel was ineffective for failing to move to suppress evidence from a "warrantless" search of Petitioner's vehicle. Petitioner claims he did not consent to the search of his vehicle, therefore, law enforcement did not have the ability to conduct a search his vehicle. Based on that theory, Petitioner hypothesizes the suppression motion on the crack cocaine recovered from his vehicle would have been successful. However, based on the facts provided by the State during the plea hearing, Petitioner did in fact consent to the search of his vehicle when talking to law enforcement. However, even if he did not consent, law enforcement did not need a warrant to search Petitioner's car because, once Petitioner admitted he had crack cocaine in his vehicle, officers had probable cause to conduct a warrantless search under the automobile exception. Under this exception, the evidence against Petitioner would not have been suppressed because the search was conducted with valid probable cause based on Petitioner's own statements. The warrantless search of Petitioner's vehicle was valid under either voluntary consent or probable cause, and here officers had *both*. Petitioner has failed to show how Counsel was deficient, or prove he would have proceeded to trial but for Counsel's actions and this Court should deny certiorari.

Petitioner fails to meet his burden as set forth in Strickland because he fails to establish how Counsel was deficient in her representation, or how he was prejudiced by Counsel's representation. Here, Petitioner believes Counsel should have moved to suppress the crack cocaine recovered from his vehicle as the evidence was illegally obtained by law enforcement during a warrantless search. However, a motion to suppress would not have been successful

because a warrant was not necessary to conduct the search as law enforcement had probable cause based on Petitioner's admission there was crack cocaine in the vehicle. (App. 90.) "Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) (citing Maryland v. Dyson, 527 U.S. 465 (1999)).

Further, Petitioner consented to the search of his vehicle, which also allows law enforcement to conduct a warrantless search. "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005) (citing Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999)). Although Petitioner denies consenting to the search, Counsel testified, "I think he consented, because he continued to talking to [law enforcement] and continued telling them that there were drugs inside the vehicle." (App. 75.) Petitioner's own Counsel believed he consented to the search of his vehicle, although she would have moved to suppress the evidence had Petitioner wanted to proceed to trial, the chances of that being successful were frankly slim. The post-conviction relief court also found, "Based on the testimony at the PCR hearing, this Court most probably would have not granted the motion to suppress. One significant factor was that the [Petitioner] eventually gave his consent for the search." (App. 8.)

Petitioner also fails to show how he was prejudiced by Counsel's representation. Counsel secured a plea agreement with a negotiated sentence that benefited Petitioner and, based on her credible testimony, Petitioner was happy with the offer. Petitioner even testified, "I'm looking at a life sentence[.] I say ten better than life, at least I do have a max-out date, because if I have

life, natural life, I don't have no max-out date." (App. 47.) Additionally, Counsel testified Petitioner told her he did not want to go to trial. Petitioner claims he would now want to go to trial because he believes evidence recovered from his vehicle should be suppressed. Petitioner's theory that a motion to suppress would be successful is unrealistic but, even if it was successful, it would only affect one of his three charges. Petitioner would still face ten years for first degree assault and battery and one year for the unlawful carrying charge at trial. A guilty verdict in those cases could result in the same sentence Petitioner is currently serving.

Ultimately, Petitioner knowingly, voluntarily, and intelligently entered a guilty plea on his charges. The record and plea waiver form show Petitioner had a full understanding of the charges he was pleading to and the negotiated sentence the court would impose. The warrantless search on Petitioner's vehicle was proper based on consent and probable cause. Counsel testified she would have taken Petitioner's case to trial, but Petitioner told her he did not want a trial. Counsel was able to secure a favorable guilty plea for Petitioner, which allowed him to avoid a potential life sentence. The post-conviction court properly denied Petitioner relief in this case and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: _____
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Nov. 28, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
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Appellate Case No. 2018-000883

JONQUAY MCCOMBS,

Petitioner,

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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 United States mail, postage prepaid:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville, South Carolina 29601

This 28th day of November, 2018

Carlotta L. Weaver

CARLOTTA L. WEAVER
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

November 28, 2018

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

Re: **Jonquay Rakee McCombs v. State of South Carolina**
Appellate Case No. 2018-000883
Lower Court Case No. 2017-CP-46-1608

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,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/clw
Enclosures

cc: William G. Yarborough, III, Esquire (2 copies)

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