



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

December 21, 2018

DEC 21 2018

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

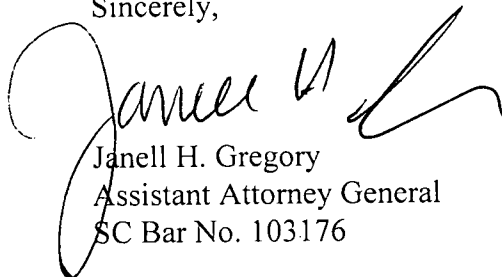
S.C. SUPREME COURT

Re: Kenyon Jemel Brown v. State of South Carolina
Appellate Case No. 2018-000713
Lower Court Case No. 2016-CP-46-3011

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/cc
Enclosures

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Circuit Court Judge

RECEIVED

DEC 21 2018

Appellate Case No. 2018-000713

S.C. SUPREME COURT

KENYON JEMEL BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JANELL H. GREGORY
Assistant Attorney General
SC Bar No. 103176

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

STATEMENT OF ISSUE.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS4

STANDARD OF REVIEW6

ARGUMENT.....8

The post-conviction relief court properly determined Petitioner failed to establish Counsel was constitutionally ineffective for failing to advise him of his right to testify at the Jackson v. Denno¹ hearing where Counsel properly advised Petitioner of his right to testify and he elected not to do so, and thereafter he knowingly, voluntarily, and intelligently entered a guilty plea.8

CONCLUSION.....13

¹ Jackson v. Denno, 378 U.S. 368 (1964).

RESPONDENT'S STATEMENT OF THE ISSUES

Did the post-conviction relief court properly determine Petitioner failed to establish Counsel was constitutionally ineffective for failing to advise him of his right to testify at the Jackson v. Denno hearing where Counsel properly advised Petitioner of his right to testify yet he elected not to do so, and thereafter he knowingly, voluntarily and intelligently entered a guilty plea?

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 2015 term, the York County Grand Jury indicted Petitioner for habitual traffic offender (2015-GS-46-2138). During the October 2015 term, the York County Grand Jury indicted Petitioner for two counts of distribution of crack cocaine (2015-GS-46-3020 and 3021), possession with intent to distribute crack cocaine (2015-GS-46-3022), possession with intent to distribute cocaine (2015-GS-46-3023) possession with intent to distribute clonazepam (2015-GS-46-3024); and possession of oxycodone (2015-GS-46-3025). Assistant Public Defender Melissa Inzerillo of the Sixteenth Circuit Public Defender's Office ("Counsel") represented Petitioner. Assistant Solicitor Marina Hamilton of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On April 26, 2016, Petitioner appeared before the Honorable John C. Hayes for a Jackson v. Denno hearing and a motion to suppress evidence. After witness testimony and argument by the State and Counsel on both motions, the court found portions of Petitioner's statement should be redacted, however, the remaining portions would be admissible at trial. The court also denied Petitioner's suppression motion. After a brief recess, Petitioner pled guilty as indicted. Pursuant to a recommendation from the State, Judge Hayes sentenced Petitioner to concurrent terms of ten years for distribution of crack cocaine, ten years for possession with intent to distribute crack cocaine, ten years for possession with intent to distribute cocaine, five years for habitual traffic offender, five years for possession with intent to distribute clonazepam, and five years for possession of oxycodone. Petitioner did not appeal his guilty plea.

Petitioner filed his application for post-conviction relief on October 12, 2016, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. Failure to articulate a fourth and fifth amendment claim
2. Violations of 4th, 5th, 6th, 14th constitutional right(s)
 - a. Failure to articulate and assert fourteenth amendment claim
3. Illegal and unlawful arrest. Invasion of privacy
 - a. Defective arrest affidavit, warrantless arrest and seizure of property.

An evidentiary hearing into the matter was convened on November 6, 2017, at the Moss Justice Center before the Honorable J. Cordell Maddox. Petitioner was present at the hearing and represented by Nathan Sheldon, Esquire (“PCR Counsel”). Assistant Attorney General Justin Hunter of the South Carolina Attorney General’s Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel also testified. By order filed April 4, 2018, Judge Maddox denied Petitioner’s application in its entirety finding Petitioner failed to demonstrate how Counsel’s performance was unreasonable under prevailing professional norms. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

Habitual Offender Charge

On June 19, 2014, officers of the Rock Hill Police Department pulled Petitioner over for speeding. (App. 66.) During the traffic stop, officers discovered Petitioner's license was suspended on September 29, 2011 after being deemed a habitual traffic offender. (App. 67.) Petitioner had three separate convictions within a three year period. (App. 67.)

Drug Charges

On May 28, 2015, Petitioner distributed .1 grams of crack to a confidential informant in exchange for twenty dollars. (App. 67.) On June 19, 2015, Petitioner exchanged .1 grams of crack to a confidential informant for forty dollars. (App. 67.)

In July of 2015, Petitioner was staying at the Econo-Lodge in York County and paying for his room on a day to day basis. (App. 27, 31.) On July 17, 2015, Petitioner failed to pay for his room prior to the check-out time and, per hotel policy, hotel management contacted the Rock Hill Police Department for assistance clearing Petitioner's room. (App. 28.) There was no one in the room, so officers gave management permission to vacate the room. (App. 28.) The manager collected items from Petitioner's room and placed them in large trash bags, which were then stored in her office. (App. 28-29.) Later, officers returned to the Econo-Lodge where the manager escorted them to her office and showed them the trash bags containing Petitioner's belongings. (App. 30.) The manager consented to the officers looking in the bags and Officer Harrelson noted a smell of marijuana coming from the items. (App. 38.) As he started to look through the trash bags, he located a black mesh bag that housed some pills, marijuana and a white substance, which he knew was either crack or cocaine based on his training and experience. (App. 38-39.) Officer Harrelson took the items back to his office where he weighed

the marijuana, crack, and cocaine and counted the pills. (App. 39.) Officer Harrelson found twenty Oxycontin pills, thirteen Clonazepam pills, 1.6 grams of cocaine, and 1.58 grams of crack cocaine. (App. 39-40, 67.) During an interview with Officer Harrelson, Petitioner admitted the drugs found in the mesh bag belonged to him and he did sell drugs. (App. 67.)

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 (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." Cherry, 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

The post-conviction relief court properly determined Petitioner failed to establish Counsel was constitutionally ineffective for failing to advise him of his right to testify at the Jackson v. Denno² hearing where Counsel properly advised Petitioner of his right to testify and he elected not to do so, and thereafter he knowingly, voluntarily, and intelligently entered a guilty plea.

Petitioner's allegation that Counsel was deficient because she failed to advise Petitioner of his right to testify at the pretrial Denno hearing is meritless. As the post-conviction relief court properly found, Counsel did inform Petitioner of his right to testify during the Denno hearing. Nevertheless, even if she had failed to do so, Counsel argued successfully to have significant portions of the statement redacted during the hearing, which would have impacted the evidentiary value of the statement had Petitioner proceeded to trial. Counsel also filed a motion to suppress the drugs found in Petitioner's belongings at the Econo-Lodge, which was denied by the lower court. It was only after the motion to suppress was denied that Petitioner made a decision to see what the State was willing to offer and enter a guilty plea. It is evident from Petitioner's testimony that his decision not to go forward with a trial did not hinge on the outcome of the Denno hearing, but rather the suppression motion. Once the suppression motion was denied, Petitioner sought a plea deal from the State and elected to enter a guilty plea. During the guilty plea hearing, Petitioner agreed with the facts presented by the State, which included the statement he made to law enforcement, and admitted his guilt on all charges. As the post-conviction court properly found, Petitioner failed to meet his burden to show how he was prejudiced by Counsel's representation. The post-conviction court properly denied Petitioner relief on this claim and this Court should deny certiorari.

² Jackson v. Denno, 378 U.S. 368 (1964).

a. Petitioner properly advised of right to testify at Denno hearing

The post-conviction relief court found credible Counsel's testimony that she did discuss with Petitioner his right to testify at the Denno hearing and was therefore not deficient. (App. 126.) Counsel testified her notes indicated she went over Petitioner's right to testify during pre-trial motions and trial. (App. 107.) Counsel also testified she communicated to Judge Hayes Petitioner was still considering those options. (App. 107.) Counsel further testified she did not believe Petitioner's "flat denial" would have changed the outcome of the Denno hearing as she has never seen Judge Hayes exclude a statement based on the "flat denial" of one of her clients. (App. 107.) The post-conviction relief court also found it was unlikely the statement would have been kept out, even if Petitioner testified, because of the officer's testimony at the hearing. (App. 126.)

Counsel further testified, although Petitioner did deny making the statement to her, he also indicated he was using drugs at the time of his arrest. (App. 109.) Petitioner also wrote a letter to the head of drug court asking to be admitted and Counsel testified the content of the letter indicated Petitioner was using drugs. (App. 109.) During the Denno hearing, Counsel was successful in getting portions of the statement redacted and, had Petitioner elected to proceed to trial, Counsel testified her trial strategy would have been to challenge the relevancy of the redacted statement since the redactions made the statement very general. (App. 108.) Counsel testified the portions of the statement the jury would have heard would have shown Petitioner was a drug addict and the drugs the State alleges he possessed at the Econo-Lodge were for personal use and not for distribution. (App. 108.) According to Counsel, there was no evidence law enforcement saw Petitioner deal drugs from his hotel room and she discussed with Petitioner a simple possession defense. (App. 108.)

Ultimately, Petitioner chose to plead guilty after the lower court denied his suppression motion. When Petitioner took the stand, PCR Counsel asked him to explain the concerns he had with Counsel's representation. (App. 114.) Petitioner focused solely on the suppression motion and his initial arrest. (App. 114.) Later in Petitioner's testimony, PCR Counsel again allows Petitioner to discuss the concerns he had about his case and Petitioner continues to talk about how he felt law enforcement should have had more evidence to prove the drugs found at the Econo-Lodge were actually his drugs. (App. 116.) Counsel testified Petitioner focused on the suppression motion and would research case law on that issue. (App. 109.) Unless prompted, Petitioner never discussed the statement he made to law enforcement or his desire to testify at the Denno hearing. It is evident from the record, the Denno hearing was not the turning point in Petitioner's decision to plead guilty and forgo a trial.

Petitioner likens his case to that of the petitioner in Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010). In Kolle, this Court found plea counsel was deficient for failing to procure pertinent discovery materials that would have allowed plea counsel to effectively cross-examine officers at a suppression hearing. This Court stated, "Moreover, if plea counsel truly believed the suppression issue was meritorious, he could have advised Kolle to proceed to trial and, if convicted, challenge the denial of the suppression motion on direct appeal." Id. Here, Counsel was able to conduct a thorough cross-examination of the officer who testified at the Denno hearing. Counsel challenged the officer on the location of the interview, the timing of the interview in relation to Petitioner's arrest, the lack of audio or visual recording of the interview, and the fact that Petitioner did not write or sign a statement during the interview. (App. 15-16.) Counsel also confronted the officer on the fact that he never showed Petitioner the black mesh bag where the drugs were located. (App. 17.) Unlike the plea counsel in Kolle, Counsel here

conducted a thorough cross-examination of the officer who testified about Petitioner's statement. Additionally, Counsel testified she had a trial strategy and was prepared to go to trial, however, Petitioner was interested in what the State would offer after the lower court denied the motion to suppress the drugs found at the Econo-Lodge. (App. 111.) Counsel testified Petitioner rejected one of the offers, but decided to plead guilty when the State offered "ten [years] to take care of everything." (App. 111.) Counsel testified it was Petitioner's decision to plead guilty and Petitioner never wavered in that decision during the plea hearing. (App. 111-112.)

b. Petitioner entered a voluntary guilty plea

The lower court found Petitioner entered his guilty plea freely, voluntarily, knowingly, and intelligently. (App. 68.) "The general rule is that guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975) Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [a petitioner] 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). This Court has held, "where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018).

Here, Petitioner sought out a plea from the State after the lower court denied his motion to suppress the drugs that were found in his room at the Econo-Lodge. During the plea hearing,

Judge Hayes conducted a thorough colloquy with Petitioner where Petitioner indicated he was guilty of each of the charges against him. (App. 59-64.) Petitioner agreed with the facts of the case recited by the State and testified he was pleading guilty freely and voluntarily. (App. 65-68.) Petitioner also indicated during the colloquy he was satisfied with Counsel's representation. (App. 59.)

The post-conviction relief court properly found Petitioner's Counsel was not deficient and Petitioner has failed to overcome the presumption afforded to Counsel in Ard³ or meet his burden as set forth in Strickland⁴. It is evident from the record the suppression motion for the drugs was the largest factor in Petitioner's decision to plead guilty. Counsel was successful in getting Petitioner's statement redacted to the point of potentially being irrelevant, and yet he still decided to plead guilty only after the suppression motion was denied by the lower court. It would stand to reason that even if Petitioner's statement was completely kept out, Petitioner would still have sought a plea deal from the State once the lower court denied his suppression motion. It was also clear from Counsel's testimony that Petitioner was really focused on the suppression motion as that was the issue he told Counsel he was researching. Additionally, Petitioner's own testimony showed his decision to plead guilty to his charges was dependent on the suppression motion, not the Denno hearing. Petitioner was properly denied relief by the post-conviction relief court 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.

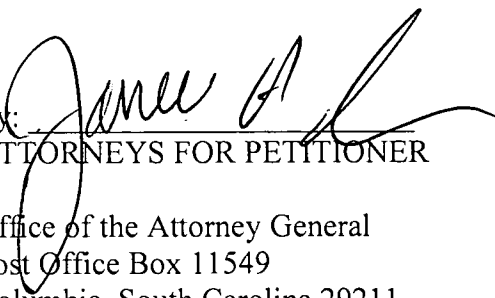
³ Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 596.

⁴ Strickland, 466 U.S. 668.

Respectfully submitted,

ALAN WILSON
Attorney General

JANELL H. GREGORY
Assistant Attorney General
SC Bar No. 103176

By: 
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 21, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2018-000713

KENYON JEMEL BROWN,

Petitioner,

v.

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:

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 21st day of December, 2018


CAROLINE COLLINS
Administrative Coordinator