STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO AIKEN COUNTY
Doyet A. Early, III, Plea Judge
Dianne S. Goodstein, Post-Conviction Relief Judge

Appellate Case No. 2018-000749

KENNETH B. EVANS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUES

I.

Did the post-conviction relief court properly determine Petitioner failed to establish any constitutional depravations entitling him to relief where the plea judge sentenced petitioner within the statutory range of the offenses he was charged with and where plea counsel lacked any basis to object to the court's sentence and where a request to reconsider would likely have little effect on the Court's decision?

II.

Did the post-conviction relief court properly determine Petitioner failed to establish any constitutional depravations entitling him to relief where Petitioner failed to establish that plea counsel failed to prepare a defense or meet with Petitioner, when the probative evidence produced during the post-conviction relief hearing showed that plea counsel met with Petitioner two to three times and discussed relevant defenses with him?

STATEMENT OF THE CASE

Petitioner Kenneth Evans is presently confined in the South Carolina Department of Corrections following his guilty plea in Aiken County. On June 5, 2015, at approximately 4:00 AM, the Aiken Department of Public Safety received a call from a female about a suspicious car parked in her driveway with its headlights on. A police officer approached the vehicle and found Petitioner passed out behind the wheel. The officer woke Petitioner and observed that his speech was slurred and his eyes were bloodshot and glassy. Petitioner submitted to field sobriety testing and was ultimately charged with driving under the influence. Another officer who arrived to assist with the arrest noticed a gun on the driver's side floorboard. The gun was seized and it was discovered that the serial number had been obliterated. In a subsequent search of the vehicle, the officers discovered 32.49 grams of methamphetamine in the center console. On October 16, 2015, Petitioner followed his estranged wife to a hair salon. While Petitioner's wife was receiving her haircut, Petitioner approached her and began asking her questions despite being asked to leave. Petitioner was charged with harassment in the first degree for this incident.

During its January 2016 term, the Aiken County Grand Jury indicted Petitioner for possession of a weapon during the commission of a violent crime (2016-GS-02-17), trafficking in methamphetamine of greater than 28 grams but less than 100 grams second offense (2016-GS-02-18), possession of a pistol with an obliterated serial number (2016-GS-02-19), unlawful carrying of a pistol (2016-GS-02-20), and harassment in the first degree (2016-GS-02-21). He was represented on these charges by Assistant Public Defender Michael Bradley McMillian, Esquire. Assistant Solicitor Elizabeth B. Young of the Second Circuit Solicitor's Office prosecuted the case.

On April 14, 2016, Petitioner appeared in the Aiken County Court of General Sessions before the Honorable Doyet A. Early, III, circuit court judge, and pled guilty to trafficking methamphetamine of more than 28 grams but less than 100 grams second offense, possession of a pistol with an obliterated serial number, and harassment in the second degree. Petitioner's unlawful carrying of a pistol and possession of a weapon during the commission of a violent crime charges were dismissed as a result of his plea. Petitioner plead without recommendation or negotiation. Judge Early sentenced Petitioner to sixteen years' imprisonment on the trafficking charge, five years' imprisonment on the possession of a pistol charge and thirty days on the harassment charge. All of Petitioner's sentences were to run concurrently resulting in an aggregate total of sixteen years' imprisonment.

Petitioner filed a notice of appeal challenging his guilty plea and sentence on April 15, 2016. However, pursuant to Rule 203(B), SCACR, plea counsel explained that he did not have a good faith basis for presenting any issues regarding Petitioner's guilty plea to the Court of Appeals. Plea counsel also forwarded this explanation to Petitioner and advised him he had twenty days to inform the Court of Appeals of any arguable issues preserved for appellate review. Petitioner failed to respond or otherwise provide the Court of Appeals with a sufficient explanation. By order filed June 30, 2016, the Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was returned to the circuit court on July 20, 2016.

On August 22, 2016, Petitioner filed an application for post-conviction relief (2016-CP-02-01894), alleging three grounds for relief. Petitioner alleged that plea counsel was ineffective for: (1) failing to object after Petitioner received a sixteen year sentence, (2) not properly preparing a defense for Petitioner, and (3) failing to file a motion to suppress the evidence

against Petitioner. On December 19, 2016, Respondent served its return to the application and requested an evidentiary hearing on the application. An evidentiary hearing was convened May 26, 2017, before the Honorable Dianne S. Goodstein, circuit court judge. Petitioner was present alongside counsel Robert R. Thuss, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and Respondent presented testimony from plea counsel. At the conclusion of the evidentiary hearing, Judge Goodstein took the matter under advisement.

Thereafter, Judge Goodstein denied relief, and, on June 22, 2017, issued a written order denying the application in full. This order was filed with the Aiken County Clerk of Court on June 30, 2017. On July 10, 2017, Petitioner filed a motion to reconsider the order of dismissal. On March 8, 2018 judge Goodstein denied Petitioner's motion to reconsider and the order was filed on March 16, 2018. Petitioner filed his notice of appeal to this Court on April 6, 2018. On appeal, Petitioner challenges only the denial of the first two grounds raised in his post-conviction relief application.

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. 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). The questions presented to this Court in the current appeal are questions of fact.

ARGUMENT

I.

The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations entitling him to relief because the plea judge sentenced petitioner within the statutory range of the offenses he was charged with, plea counsel lacked any basis to object to the court's sentence, and a request to reconsider was unlikely to effect the Court's decision.

Petitioner claims the post-conviction relief court erred in denying him relief because plea counsel was ineffective for failing to ask the sentencing judge to reconsider his sentence or moving to withdraw Petitioner's plea. Petitioner specifically takes issue with the sentence he received in light of an informal meeting between the plea judge, the solicitor, and plea counsel in which the judge indicated Petitioner would receive a sentence of more than seven years but less than fifteen. Petitioner argues plea counsel's performance was deficient under the Strickland v. Washington test. However, the post-conviction relief court properly rejected this argument, finding Petitioner's sentence was within the statutory sentencing range, that the sentence was within the plea judge's discretion, and the risk of a higher sentence was something Petitioner was advised of before he entered his plea. Furthermore, the post-conviction relief court properly found there was no legal reason to object to the sentence and such an objection would likely not have been successful. These findings are not controlled by an error of law and are supported by the record. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. 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). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "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). 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 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, the 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).

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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

"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, 712 (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").

Petitioner asserts that plea counsel was deficient for not objecting to the plea judge's sentence or asking the plea judge to reconsider the sentence after Petitioner received a sixteen year sentence. Petitioner asserts that he was induced to plead guilty based on an informal conversation between the plea judge, plea counsel and the solicitor in which the plea judge asserted he was likely to sentence Petitioner to more than seven years but less than fifteen.

Petitioner also claimed that he did not know that law enforcement officers or his ex-wife would be speaking at the plea. (App. 69-70). After receiving his sentence, Petitioner testified that he asked plea counsel to withdraw his plea. (App. 71). Plea counsel contradicted Petitioner's version of events and maintained that Petitioner never asked him to move for a reconsideration of his sentence, but rather Petitioner asked plea counsel to file an appeal. (App. 96-97). Plea counsel did file an appeal on Petitioner's behalf.

In the present case, Petitioner was initially offered a negotiated plea offer of fifteen years by the solicitor which Petitioner rejected. (App. 99). Petitioner never indicated that he was willing to accept this plea offer and even testified that if he thought he would get sentenced to fifteen years he "wouldn't have went in there at all. I'd rather went to trial. I'd took my – chances." (App. 75, lines 5-7). Therefore, Petitioner knowingly and willfully chose to plea without negotiation or recommendation rather than accept a guaranteed fifteen year sentence or proceed to trial. Ultimately, Petitioner was sentenced within the statutory sentencing range for the crimes he was charged with. When entering his plea, the plea judge explained to Petitioner that he had the discretion to sentence him anywhere from a minimum of seven years up to a maximum of thirty years' imprisonment on the trafficking charge alone. (App. 7). Petitioner indicated that he understood this possibility. (App. 7). Furthermore, plea counsel testified that he explained to Petitioner that the plea judge had not promised to sentence Petitioner between seven and fifteen years. (App. 93).

Petitioner maintained at the post-conviction relief hearing that he would have taken his chances at trial if he had known he would receive a sentence of fifteen years or more. However, Petitioner failed to show that plea counsel was deficient in his representation and that but for plea counsel's deficiencies Petitioner would not have plead guilty and insisted on going to trial. In

fact, the deficiency in representation that Petitioner complains of is not related to plea counsel's conduct leading up to the plea or during the plea itself, but rather Petitioner complains that plea counsel didn't object to the sentence after it was imposed. Plea counsel was not deficient in failing to object to Petitioner's sentence because there was no reason to object to the sentence. The plea judge sentenced Petitioner to a sentence within the appropriate sentencing range and did so after informing Petitioner that he had discretion to sentence Petitioner anywhere from as few as seven years to as many as thirty years. Perhaps Petitioner was disappointed in his sentence, but the mere fact Petitioner was disappointed in the outcome of the plea does not prove that plea counsel was ineffective. The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations warranting relief and these findings are supported by the record. This Court should deny certiorari.

II.

The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations entitling him to relief because Petitioner failed to establish plea counsel failed to prepare a defense or meet with Petitioner, and the probative evidence produced during the post-conviction relief hearing showed plea counsel met with Petitioner two to three times and discussed relevant defenses with him.

Petitioner claims plea counsel was ineffective for failing to properly prepare a defense for Petitioner or to meet with Petitioner. The post-conviction relief court properly rejected this argument and noted that plea counsel met with Petitioner for a sufficient amount of time to effectively prepare for trial and to prepare for Petitioner's guilty plea.

"There is a strong presumption 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). Moreover, when there is evidence counsel met with an applicant in preparation for trial and there is no evidence additional preparation on the

part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Plea counsel testified he and Petitioner met two to three times in person and "one lengthy time to discuss the likelihood of succeeding on a motion to suppress." (App. 90, 91, lines 16-18). In preparation for a motion to suppress, plea counsel utilized two investigators with his office to investigate whether a weapon would be in plain view in the vehicle that Petitioner was driving. (App. 91-92). Plea counsel advised Appellant he was unlikely to succeed on his motion to suppress because the vehicle would have been searched anyway once it was impounded following Petitioner's driving under the influence arrest. (App. 92). Plea counsel negotiated with the solicitor in March 2016 but could not get the solicitor to offer anything less than fifteen years' incarceration. (App. 93). Petitioner rejected that plea offer and the case was called to trial one month later. Plea counsel was ready to proceed to trial, but felt Petitioner lacked a viable defense and a plea was in Petitioner's best interest. (App. 98). Furthermore, plea counsel discussed potential sentencing outcomes and Petitioner's parole eligibility[1]. (App. 94-95).

Plea counsel competently represented Petitioner in preparation for trial and in preparation for his plea. Petitioner did not offer any evidence as to how plea counsel's alleged lack of preparation prejudiced him. Petitioner has failed to show that plea counsel was deficient or that he would not have plead guilty but for plea counsel's deficiencies. The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations warranting relief and these findings are supported by the record. This Court should deny certiorari.

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[1] Plea counsel noted that he felt Petitioner was getting conflicting advice about sentencing outcomes from his current post-conviction relief counsel, Mr. Thuss. (App. 95).

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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By: Scott Matthews
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January 3, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO AIKEN COUNTY
Doyet A. Early, III. Plea Judge
Dianne S. Goodstein, Post-Conviction Relief Judge

Appellate Case No. 2018-000749

KENNETH B. EVANS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Kaitlyn Slice, 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 mail to be delivered to Petitioner at the address below:

Robert R. Thuss
Thus Law Office LLC
7001 St. Andrews Road #193
Columbia, SC 29212

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

This 4 day of January, 2019.

KAITLYN SLICE
Legal Assistant
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 04 2019
S.C. SUPREME COURT

January 4, 2019

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

Re: **Kenneth B. Evans v. State of South Carolina**
Appellate Case No. 2018-000749
Lower Court Case No. 2016-CP-02-1894

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,

Scott Matthews

J. Scott Matthews
Assistant Attorney General
SC Bar No. 101464

JSM/ks
Enclosures

cc: Robert R. Thuss, Esquire (2 copies)