STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
W. Jeffrey Young, Plea Judge
George M. McFaddin, Post-Conviction Relief Judge

Appellate Case No. 2018-000758

EFRAIN MATOS RIVERA, 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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II.

Did the post-conviction relief court properly deny relief for the allegation that Petitioner's guilty plea was not entered into freely when Petitioner voluntarily fired previous counsel a few days before his trial was set to begin and yet plea counsel still ably represented Petitioner by moving for a continuance and moving to suppress the evidence against Petitioner?

STATEMENT OF THE CASE

Petitioner Efrain Rivera is presently confined in the South Carolina Department of Corrections following his guilty plea in Sumter County. On October 13, 2014, at approximately 9:00 AM, an officer with the Sumter County Sheriff's Office conducted a traffic stop for a speeding violation in which Petitioner was the driver of the vehicle. As the officer approached the vehicle, he smelled the distinct odor of marijuana and observed a pack of rolling papers in the center console. The officer called for backup. Once backup arrived, Petitioner was asked to step out of the vehicle, and upon doing so, gave consent for the officer to search his person. The search revealed a black plastic bag containing hundreds of pieces of wax paper and rubber bands, which are commonly used to package illegal drugs, specifically heroin, as well as $534 in cash.

Upon search of the passenger, officers found a plastic bag wrapped in duct tape around his person, which contained approximately one-hundred sixteen grams of suspect Molly (MDMA) in a rock form and a clear plastic bag containing marijuana. Officers arrested both individuals and read them their Miranda rights. While at the detention center, law enforcement personnel located approximately forty-seven grams of heroin hidden inside Petitioner's rectum. Petitioner was charged with trafficking in heroin of twenty eight grams or more.

During its February 2015 term, the Sumter County Grand Jury indicted Petitioner for possession of a schedule I or II controlled substance and trafficking in heroin twenty-eight grams or more (2015-GS-43-0182). James T. Irvin, Esquire represented Petitioner prior to his guilty plea, and after being relieved as counsel, Garryl Deas, Esquire represented Petitioner at the guilty plea. Assistant Solicitor Bronwyn McElveen, Esquire of the Third Circuit Solicitor's Office represented the State.

On August 11, 2016, Petitioner appeared in the Sumter County Court of General Sessions before the Honorable W. Jeffrey Young, and pled guilty to trafficking heroin. Pursuant to a negotiated sentence, Judge Young sentenced Petitioner to imprisonment for a term of seven years. Petitioner pled guilty after he and plea counsel picked a jury in preparation for trial.

Petitioner filed a notice of appeal challenging his guilty plea and sentence. On October 31, 2016, the South Carolina Court of Appeals dismissed Petitioner's appeal for failure to provide a sufficient explanation for appealing, as required by Rule 203(d)(1)(B), SCACR. The Remittitur was returned to the circuit court on November 18, 2016.

On November 7, 2016, Petitioner filed an application for post-conviction relief (2016-CP-43-2097), alleging three grounds for relief. First, Petitioner alleged that plea counsel, James T. Irvin, was ineffective for: (1) performance falling far below the reasonable level of representation mandated by law, (2) failure to investigate, (3) failure to file motion for Rule 5 discovery materials; (4) failure to prepare for trial, and (5) coercing Petitioner to plead guilty and accept a sentence that was unfair and unjust. Second, Petitioner alleged his second plea counsel, Garryl Deas, was ineffective for: (1) forcing and coercing Petitioner to plead guilty after denial of a continuance and (2) being unprepared for trial. Lastly, Petitioner alleged 14th and 6th Amendment Due Process violations by the trial court. On October 10, 2017, Respondent served its return and partial motion to dismiss to the application and requested an evidentiary hearing on the application. An evidentiary hearing into the matter convened on November 16, 2017, before the Honorable George M. McFaddin, Jr., circuit court judge. Petitioner was present alongside counsel, Lance S. Boozer, Esquire. Assistant Attorney General Julie A. Coleman represented Respondent. Prior to the evidentiary hearing, plea counsel James T. Irvin passed away and was unavailable to give testimony. Judge McFaddin granted Respondent's motion to dismiss the

allegations of trial court error as issues that should have been raised on direct appeal. Petitioner testified on his own behalf and Respondent presented testimony from plea counsel Garryl Deas. At the conclusion of the evidentiary hearing, Judge McFaddin denied relief.

On March 9, 2018, Judge McFaddin issued a written order denying the application in full. The order was filed with the Sumter County Clerk of Court on April 16, 2018. Petitioner filed his notice of appeal to this Court on April 23, 2018. On appeal, Petitioner challenges 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).

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that plea counsel was ineffective for failing to sufficiently investigate and advocate for Petitioner when Petitioner fired his previous counsel the day before trial and knowingly hired plea counsel on short notice.

Petitioner claims the post-conviction relief court erred in denying him relief because Petitioner's prior counsel was ineffective for performing no investigation while Petitioner resided in Florida, did not discuss the case with Petitioner, and only inquired about money when the two spoke on the telephone. Petitioner's argument is without merit. The post-conviction relief court properly found that Petitioner voluntarily relieved prior counsel just a few days before trial and choose to hire plea counsel. Petitioner failed to show that plea counsel did not investigate his case and would not have been prepared to go forward at trial. 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).

"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). "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Collins. v. State, 422 S.C. 250, 258, 810 S.E.2d 871, 875 (2018)(citing Harris, 377 S.C. at 75, 659 S.E.2d at 145).

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." Strickland, 466 U.S. 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.

In the present case, there is evidence in the record to support the post-conviction relief court's conclusions. Petitioner's first claim of error asserts that his prior counsel was deficient for not performing investigation or communicating with Petitioner about the case. Petitioner's claim of error is misplaced. Petitioner failed to prove that plea counsel, who petitioner retained the day before his trial was set to begin, was deficient under either prong of the Strickland test.

Petitioner has not met the requirements under the first prong of the Strickland test. Petitioner's primary complaints about counsel are not relevant to the conduct of plea counsel but rather pertain to his prior counsel James Irvin. Petitioner's complaints about Irvin are irrelevant in determining whether plea counsel Deas' performance was deficient. Deas provided competent representation to Petitioner on short notice. After Petitioner retained Deas to represent him on August 10, Deas had one day to prepare for trial on August 11. (App. 73). During this time, Deas filed two motions on behalf of Petitioner. (App. 74-75). Deas testified he explained the uncertainty of the motions filed and the possibility of having to proceed with trial. (App. 76-77). Deas was able to speak with the solicitor about getting the original plea deal re-offered. (App. 78). Deas testified that during his representation, he and Petitioner communicated daily. (App. 84). Petitioner was aware of the severity of the charge against him, and Deas testified that he

would never be able to work out a probationary sentence for Petitioner because the plea deal was for the mandatory minimum for the plea offered. (App. 85). Therefore, with respect to his plea counsel, Petitioner has failed to show that counsel did not adequately prepare to represent him. Thus, there is evidence in the record to support the post-conviction relief court's conclusion that plea counsel was not deficient in his representation of Petitioner.

Petitioner maintained at the post-conviction relief hearing that he told Deas multiple times that he wanted to go to trial. (App. 59; 61). 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 pled guilty and insisted on going to trial. In fact, plea counsel did everything in his power to file motions and prepare for trial in the time period he had allotted to him, including jury selection. Although plea counsel was prepared to go to trial, Petitioner ultimately decided to plea in order to avoid the potential exposure of a forty year sentence if he were convicted at trial. (App. 84). 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 a claim of ineffective assistance of counsel sufficient enough to warrant relief, and the record supports these findings. This Court should deny certiorari.

II.

The post-conviction relief court properly denied relief for the allegation that Petitioner's guilty plea was not entered into freely when Petitioner voluntarily fired previous counsel a few days before his trial was set to begin and yet plea counsel still ably represented Petitioner by moving for a continuance and moving to suppress the evidence against Petitioner.

Petitioner claims he was denied effective assistance when the trial court denied plea counsel's motion for a continuance. Petitioner further claims that he did not enter his plea agreement voluntarily because he was under duress. The post-conviction relief court properly

rejected Petitioner's arguments and concluded that Petitioner freely entered into a plea notwithstanding the circumstances surrounding his case. This Court should deny certiorari.

"A guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'" Boykin v. Alabama, 395 U.S. 238, 242 (1969). This is because "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). In order to find a guilty plea was knowingly and voluntary entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin, 395 U.S. at 244.

However, "[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").

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's advice was not within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 56 (1985). A defendant needs to show (1) counsel's representation fell below an objective standard of

reasonableness and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted in going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)(citing Hill, 474 U.S. 52, 106 S.Ct. 366).

"Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11, 103 S.Ct. 1610, 1616 (1983). Trial courts have broad discretion on matters of continuances and only an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to assistance of counsel. Id. at 11-12, 103 S.Ct. at 1616; State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007)("the granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion"). Furthermore, "[w]hen a motion for continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal." State v. Motley, 251 S.C. 568, 570, 164 S.E.2d 569, 572 (1968).

Plea counsel testified he and Petitioner met multiple times and spoke over the phone daily. (App. 84). Plea counsel further testified to a discussion with Petitioner regarding the trial judge's ability to grant or deny any motion, and Petitioner understood these discussions. (App. 76-77). Plea counsel admitted during testimony he "would have loved to have had more time to prepare...but certainly would have been prepared to try [the case] if we had gone to trial." (App. 78-79). Plea counsel's testimony indicates that he would have been prepared to go to trial if Petitioner insisted on trial after being informed of all the evidence and potential sentence. Petitioner testified the court denied the motion for continuance because the case was pending for two years and the court was ready to bring it to trial. (App. 58). The court was within their

discretion to deny the motion for continuance, and the court's rationale for denying the motion does not render plea counsel's assistance deficient.

During the plea, Petitioner admitted to being guilty (App. 9), waived his right to a jury trial (App. 10-11), claimed "not really" when asked if he was threatened to plead guilty (App. 11), told the court he was "really satisfied with service" from his plea counsel (App. 11), and did not say anything to the court about being under duress when given the opportunity to say something. When asked about his plea during the post-conviction relief hearing, Petitioner states "I told the judge yes because that's the only word that came out of my mouth at that time." (App. 61). Petitioner claimed he pled guilty because his wife was crying and told him to sign the plea, so he signed the seven years because he was under a lot of pressure. (App. 61).

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 forced Petitioner into not freely entering into a plea. 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 an involuntary plea warranting relief, and the record supports these findings. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner freely entered into a plea after being effectively represented by counsel, 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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Appellate Case No. 2018-000758

EFRAIN MATOS RIVERA, 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:

Taylor D. Gilliam
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 4th day of February, 2019.

KAITLYN SLICE
Legal Assistant
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 04 2019
S.C. SUPREME COURT

February 4, 2019

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

Re: **Efrain Matos Rivera v. State of South Carolina**
Appellate Case No. 2018-000758
Lower Court Case No. 2016-CP-43-2097

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: Taylor D. Gilliam, Esquire (2 copies)