

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000003

BRIAN LEE DAVIDSON #351872,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

| | Page |
|--|-------------|
| Issue Presented..... | ii |
| Statement of the Case..... | 1 |
| Standard of Review..... | 8 |
| Argument: | |
| The post-conviction relief judge properly dismissed Petitioner’s application for PCR after finding Petitioner did not have a cognizable PCR claim against plea counsel, but a non-collateral claim against the South Carolina Department of Corrections regarding the interpretation of his sentence which should be pursued through the Administrative Procedures Act. | 11 |
| Conclusion | 16 |

ISSUE PRESENTED

The post-conviction relief judge properly dismissed Petitioner's application for PCR after finding Petitioner did not have a cognizable PCR claim against plea counsel, but a non-collateral claim against the South Carolina Department of Corrections regarding the interpretation of his sentence which should be pursued through the Administrative Procedures Act.

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In August 2014, the Cherokee County Grand Jury indicted Applicant for trafficking in methamphetamine (2014-GS-11-0750), possession of alprazolam, second or subsequent offense (2014-GS-11-0751), possession of clonazepam, second or subsequent offense (2014-GS-11-0752), and possession of marijuana, second or subsequent offense (2014-GS-11-0753). William Rhoden, Esquire, represented Applicant. Assistant Solicitor Kimberly Leskanic prosecuted the case. On March 4, 2016, Applicant pleaded guilty to the lesser included offense of possession with intent to distribute methamphetamine (PWID), third offense, before the Honorable R. Keith Kelly. Applicant also pleaded guilty as indicted to the remaining possession charges. Pursuant to a negotiated sentence, Judge Kelly sentenced Applicant to imprisonment for concurrent terms of ten years for PWID methamphetamine and one year for each possession charge. Applicant did not appeal his conviction or sentence.

Applicant filed an application for Post-Conviction Relief on March 3, 2017. In his application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "I was improperly advised when I signed my plea. I was told that I was signing a non-violent sentence eligible for parole, good time, work credit, and work release. All of this was correct until February of 2017. SCDC changed my sentence a year after my plea agreement."
 - b. "I did not have an issue with my sentence until SCDC changed my maxout and eligibility due to Bolin v. South Carolina."

(App.pp.19–26).

An evidentiary hearing was convened on November 16, 2017, before the Honorable G. Thomas Cooper, Jr. in Spartanburg County, South Carolina. At the hearing, Petitioner testified when he signed his plea agreement, he was informed his PWID conviction required serving sixty-five percent of his sentence, and that he would be parole eligible and earn work credits. However, ten months into serving his sentence, the Department of Corrections changed his sentence to require him serving eighty-five percent of it, and he was no longer parole eligible. The Department of Corrections informed Petitioner that it had previously misinterpreted the applicable sentencing statute. Petitioner also testified his “issue in the case” was not with plea counsel, and that he was not unhappy with plea counsel’s representation; his only issue was with the Department of Correction’s treatment of his sentence. Further, Petitioner never testified plea counsel misadvised him in any way. (App.pp.35–39).

Judge Cooper dismissed the application, with prejudice, after determining the Applicant failed to prove any deficiency on behalf of plea counsel or any prejudice from alleged deficiencies on the part of plea counsel. Applicant filed a Notice of Appeal for the ruling of the PCR court on January 3, 2018. On December 5, 2018, Petitioner filed his Petition for Writ of Certiorari and the Appendix. This Return on behalf of the State now follows. (App.pp.43–48).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their 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 applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984); Butler, 286 S.C. at 442. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 669; Cherry, 300 S.C. at 117. First, the applicant must prove that counsel’s performance was deficient. Cherry, 300 S.C. at 117. Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (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. “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). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118. 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. at 117–18 (emphasis added). “A reasonable probability is a probability sufficient to

undermine confidence in the outcome of the trial.” Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” Strickland, 466 U.S. at 693.

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). A criminal defendant may knowingly, intelligently, and voluntarily enter a guilty plea having never been informed of its collateral consequences. See Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002) (trial counsel need not advise client of collateral consequence of parole eligibility). Only where counsel has given incorrect advice concerning collateral consequences, and the defendant would not have entered the plea but for that advice, are they relevant to the Strickland analysis. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997). Aside from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 748 (2000).

ARGUMENT

The post-conviction relief judge properly dismissed Petitioner's application for PCR after finding Petitioner did not have a cognizable PCR claim against plea counsel, but a non-collateral claim against the South Carolina Department of Corrections regarding the interpretation of his sentence which should be pursued through the Administrative Procedures Act.

Petitioner argues the PCR judge in finding his guilty plea was not involuntarily entered because Petitioner believed he would be required only to serve 65% of his sentence and he would be parole eligible. The State disagrees with this allegation of error. In his PCR application, Petitioner claimed he was "improperly advised" he would receive a non-violent sentence eligible for parole, "good time" credit, and work release. However, at the PCR hearing, Petitioner testified plea counsel did not misadvise him about his sentence, but the Department of Corrections altered it ten months into his incarceration after discovering it incorrectly interpreted the statute. Further, Petitioner testified he did not have any issues with plea counsel's representation.

As noted by the PCR judge, Petitioner is trying to enforce his original sentence and, and such efforts are non-collateral attacks which must be brought through the Administrative Procedures Act. See Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000). Accordingly, the record supports the PCR judge's findings.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

BY: 

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ATTORNEYS FOR RESPONDENT

March 6, 2019.

STATE OF SOUTH CAROLINA
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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA,

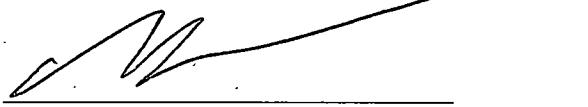
Respondent.

PROOF OF SERVICE

I, William F. Schumacher, IV, 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 United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served. This 6th day of March, 2019.


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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

March 6, 2019

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

Re: Brian Lee Davidson, #351872 v. State of South Carolina
Appellate Case No. 2018-000003
Lower Court Case No. 2017-CP-11-0192

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
SC Bar #100231

WFS/ck
Enclosures

cc: Tommy A. Thomas, Esquire
Trisha Allen, Director - Victim Advocacy Division