

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 04 2018

CERTIORARI TO FLORENCE COUNTY S.C. SUPREME COURT
Roger E. Henderson, Plea Judge
Michael G. Nettles, Post-Conviction Relief Judge

Appellate Case No. 2018-000629

TIMOTHY JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUE.....ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....4

ARGUMENT.....5

The post-conviction relief court properly determined Petitioner failed to establish plea counsel was constitutionally ineffective in advising Petitioner to enter into a written plea agreement waiving his right to challenge his pleas through post-conviction relief where counsel explained to the terms of the plea agreement to Petitioner, including what post-conviction relief was and what the waiver entailed, and Petitioner made a knowing, voluntary, and intelligent decision to waive post-conviction relief in exchange for a favorable negotiated sentence disposing of all pending State Grand Jury charges.5

CONCLUSION.....10

PETITIONER'S STATEMENT OF ISSUE

Whether trial counsel provided effective assistance of counsel where he failed to explain fully the consequences of the appellate review and post-conviction relief waiver in Petitioner's guilty plea, such that Petitioner's post-conviction relief waiver was not knowingly, voluntarily, or intelligently made?

RESPONDENT'S STATEMENT OF ISSUE

Did the post-conviction relief court properly determined Petitioner failed to establish plea counsel was constitutionally ineffective in advising Petitioner to enter into a written plea agreement waiving his right to challenge his pleas through post-conviction relief where counsel explained to the terms of the plea agreement to Petitioner, including what post-conviction relief was and what the waiver entailed, and Petitioner made a knowing, voluntary, and intelligent decision to waive post-conviction relief in exchange for a favorable negotiated sentence disposing of all pending State Grand Jury charges?

STATEMENT OF THE CASE

Petitioner Timothy Johnson is presently confined in the South Carolina Department of Corrections following his guilty plea in Florence County to State Grand Jury indictments. On October 22, 2015, the State Grand Jury indicted Petitioner for one count of trafficking in heroin greater than 28 grams, seven counts of distribution of heroin, one count of possession with intent to distribute heroin, and one count trafficking heroin greater than 28 grams (conspiracy) (2015-GS-47-0021, -0022), as part of a multi-count, multi-defendant indictments stemming from an investigation into a heroin trafficking ring. Brendan P. Barth, Esquire, represented Petitioner. Assistant Attorney General David Fernandez of the South Carolina Attorney General's Office, prosecuted the case.

On August 1, 2016, Petitioner entered into a written plea agreement, in which he agreed to "fully and truthfully cooperate with the Office of the Attorney General of South Carolina, and any local, state and federal law enforcement agents in their investigation of importation, possession, and distribution of controlled substances and related unlawful activities," in exchange for a negotiated sentence range of an aggregate eighteen to twenty-two years imprisonment. As part of this plea agreement, Petitioner expressly waived his right to both a direct appeal and post-conviction relief action. ("The Defendant, Timothy Leverne Johnson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Timothy Leverne Johnson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives this right of direct appeal. Additionally, the Defendant, Timothy Leverne Johnson, understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and

voluntarily waive any post-conviction relief action except for claims that directly attack the effectiveness of advice to agree to this waiver.”) Petitioner initialed each page of this written plea agreement and signed this plea agreement.

The following day (August 2, 2016), Petitioner appeared in the Florence County Court of General Sessions before the Honorable Roger E. Henderson, circuit court judge, and pursuant to the signed plea agreement, pled guilty to seven counts of distribution of heroin and one count of possession with intent to distribute heroin as indicted, and to the lesser-included offenses of trafficking in heroin (4-14 grams) and trafficking in heroin (4-14 grams) (conspiracy). Judge Henderson accepted Petitioner’s plea and deferred sentencing.

On November 14, 2016, Petitioner again appeared before Judge Henderson for a sentencing proceeding. At this hearing, Judge Henderson sentenced Petitioner to an aggregate nineteen years imprisonment.¹ Petitioner did not pursue a direct appeal.

On April 13, 2017, Petitioner filed a *pro se* application for post-conviction relief (2017-CP-21-0952), alleging

1. Ineffective assistance of counsel: “Trial counsel failed to conduct factual and legal investigation”
2. “State Grand Jury unconstitutional assembled, evidence inadmissible: Grand Jury lacked probable cause to indict and violate fair cross section”
3. “Conviction obtained in violation of constitutional rights: rights were violated when no warrants were served for arrest-detention.”

On October 6, 2017, Respondent served its return to the application and made a partial motion to dismiss, seeking summary dismissal of all claims beyond whether counsel was

¹ This sentencing transcript is not included in the Appendix. As it was before the post-conviction relief court, this transcript should have been included in the Appendix pursuant to Rule 243(f), SCACR. Undersigned counsel has contacted counsel for Petitioner to request that Petitioner supplement the Appendix to include this transcript and it is counsel’s understanding that the Petitioner will be filing a Supplemental Appendix to include this erroneously omitted transcript.

ineffective for advising him to enter the written plea agreement waiving his rights to challenge his conviction through post-conviction relief pursuant to the written plea agreement.

On January 25, 2018, Applicant, through his counsel, amended his application to include the following additional allegations:

1. Counsel was ineffective for failing to properly advise Applicant regarding entry into a plea agreement that would constitute a waiver of Applicant's appellate and post-conviction relief rights.
2. Counsel was ineffective for failure to meet with Applicant in a sufficient amount for Applicant to understand the nature of the allegations against him, any potential defenses he may have had, and the State's burden of proof with respect to his charges, thus rendering Applicant's plea involuntarily entered into. Counsel was ineffective for misleading and misinforming Applicant that all other defendants alleged in the indictment had agreed to cooperate against Applicant and that Applicant was the final remaining defendant, thus rendering Applicant's plea involuntarily entered into.
3. Counsel was ineffective for failure to investigate the facts and circumstances of alleged video and photographic evidence.

An evidentiary hearing was convened February 2, 2018, at the Florence County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Petitioner was present at the hearing and represented by Jonathan Waller, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Testimony was taken from Petitioner and plea counsel Barth.

Following testimony, Judge Nettles denied the application from the bench. A written order of dismissal was filed on March 20, 2018, finding counsel's credible testimony established he advised Petitioner adequately of the terms of the plea agreement, including the waiver of post-conviction relief on all ground other than whether counsel was ineffective in advising him to enter into the plea agreement. Judge Nettles' written ruling make specific findings that counsel's testimony on the issues before the court were credible and dispositive while Petitioner's testimony was not credible.

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

The post-conviction relief court properly determined Petitioner failed to establish plea counsel was constitutionally ineffective in advising Petitioner to enter into a written plea agreement waiving his right to challenge his pleas through post-conviction relief where counsel explained to the terms of the plea agreement to Petitioner, including what post-conviction relief was and what the waiver entailed, and Petitioner made a knowing, voluntary, and intelligent decision to waive post-conviction relief in exchange for a favorable negotiated sentence disposing of all pending State Grand Jury charges.

On appeal, Petitioner argues the post-conviction relief court erred in finding Petitioner knowingly and voluntarily waived his right to pursue post-conviction relief against plea counsel on all claims other than whether counsel was ineffective in advising him to enter into the plea agreement. Specifically Petitioner argues “plea counsel’s advice fell below and objective standard of reasonableness because he failed to fully explain the appellate and collateral rights that Petitioner waived when he advised Petitioner to plead guilty.” (PWC p. 10). However, the post-conviction relief court, relying on the plea agreement itself and the testimony from plea counsel that the court specifically found to be credible, properly found plea counsel correctly advised Petitioner as to what post-conviction relief was, what the waiver entailed, and that Petitioner knowingly, intelligently, and voluntarily waived his right to pursue most post-conviction relief claims in exchange for a favorable negotiated sentence from the State. The post-conviction relief court’s findings are supported by probative evidence and the record and do not constitute an error of law. 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).

“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”).

Under South Carolina law, a criminal defendant can choose to waive his right to collateral review of his conviction so long as the waiver is knowingly and voluntarily made. Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary). Plea agreements in general operate under contractual principles, and are upheld when each party receives the benefit of the bargain. State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994).

However, while appellate and collateral waivers are enforceable, a criminal defendant who has waived his appellate and collateral review is still entitled to proceed forward with a post-conviction relief action on the very narrow issue of challenging his attorney’s conduct in advising him to enter into the waiver. Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) (“Consequently, we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective.”).

In the present case, Petitioner chose to plead guilty and agreed to waive his appellate and post-conviction relief rights (beyond the limited issue of counsel’s advice in entering to the plea agreement) in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and this agreement is valid under contractual law. Moreover, Petitioner was afforded

an opportunity to present evidence and otherwise argue plea counsel was ineffective for advising him to enter into this plea agreement.

At the evidentiary hearing, plea counsel testified he met with Petitioner and discussed every aspect of the plea agreement, including his waiver of appellate and collateral challenges to his plea. (App. 77-79, 85-86). Counsel testified he advised Petitioner generally about what direct appeal post-conviction relief actions were, the types of errors that could be challenged through each, and that he would be waiving the right to file a direct appeal or post-conviction relief action by accepting the plea agreement. (App. 78-79, 86). He testified Petitioner had objections to the forfeiture provisions of the plea agreement and he was able to negotiate to remove portions of the forfeiture provisions from the agreement at Petitioner's request (App. 77). He testified Petitioner made no such request for the removal of the direct appeal or post-conviction relief waivers as he has for the forfeiture provisions. (App. 86-87).

In contrast, Petitioner testified nothing in the plea agreement was explained to him and he was simply told to sign and initial in certain places. (App. 62-63, 65, 67-68, 72-73). He then testified the only portion of the plea agreement that they discussed was the forfeiture provision. (App. 63-64). He testified he did not know what an appeal or a PCR was until he got to prison. (App. 64-65). Petitioner testified he lied to Judge Henderson during his plea based on the advice of plea counsel. (App. 73-74)

After listening to the testimony of plea counsel and Petitioner, the post-conviction relief court denied the application from the bench. In the written order of dismissal that followed, the post-conviction relief court specifically found counsel's testimony was credible and established he advised Petitioner adequately of the terms of the plea agreement, including the waiver of post-conviction relief on all grounds other than whether counsel was ineffective in advising him to

enter into the plea agreement. Conversely, the court found Petitioner's testimony was not credible. These findings are supported by the record and should be afforded great weight. See Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) (“[W]e afford great deference to a PCR court's credibility findings.”).

In support of his argument that plea counsel was constitutionally ineffective, Petitioner relies almost exclusively on his own testimony—which the plea court explicitly found not to be credible.

Ultimately, Petitioner's entering into the favorable plea agreement with the State induced not by any purported misadvice by counsel or any lack of knowledge as to what post-conviction relief was and the implications of the waiver, but by his own desire to secure a favorable plea offer for the lowest term of imprisonment possible. His decision to enter into the plea agreement was knowing, voluntary, and intelligent. The post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations warranting relief and these findings are supported by the record. This Court should deny certiorari.

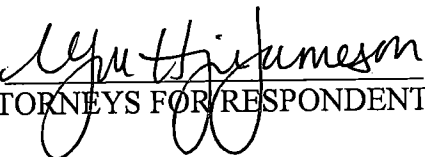
CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

By: 
ATTORNEYS FOR RESPONDENT

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

April 4, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 04 2019

CERTIORARI TO FLORENCE COUNTY
Roger E. Henderson, Plea Judge
Michael G. Nettles, Post-Conviction Relief Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000629

TIMOTHY JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

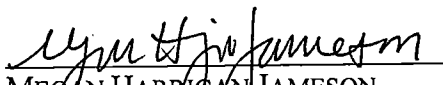
PROOF OF SERVICE

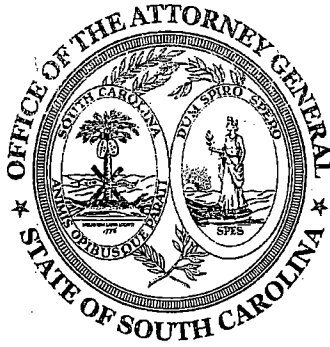
I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Appellate Defender Victor Seeger
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 4th day of April, 2019.


MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737



RECEIVED

APR 04 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 4, 2019

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

Re: **Timothy Johnson v. State of South Carolina**
Appellate Case No. 2018-000629

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above-referenced post-conviction relief appeal for filing with the Court. By copy of this letter, I am also serving opposing counsel.

Please let me know if anything else is needed as to this matter.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/cc
Enclosures

cc: Victor R. Seeger, Esquire (2 copies)