STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

RECEIVED

APR 22 2019

S.C. SUPREME COURT

BRETT THOMAS CURTISS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001767

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where plea counsel failed to obtain laboratory testing documents which showed that evidence used against Petitioner contained no controlled substances, where plea counsel also failed to obtain a statement from Petitioner's co-defendant allegedly implicating him, and where plea counsel failed to intervene when Petitioner received four more years than the lawful maximum as part of a negotiated plea?

STATEMENT

A York County grand jury indicted Petitioner for possession with intent to distribute methamphetamine on June 18, 2015 and trafficking in methamphetamine and possession with intent to distribute marijuana on August 18, 2016. App. 154 – 159. Petitioner pleaded guilty to all three charges as part of a negotiated plea on July 10, 2017 before the Honorable J. Cordell Maddox. App. 1. The negotiation was for a nine year active sentence. App. 5 ll. 6 – 7. Jennifer Colton and Robert Newkirk served as the assistant solicitors, and Derek Chiarenza represented Petitioner.

During the plea colloquy, the plea judge inquired about Petitioner's age and education level but never found that Petitioner had pleaded knowingly, voluntarily, and intelligently. App. 5 l. 12 – App. 7 l. 25. The plea judge accepted the plea immediately before sentencing. App. 11 ll. 11 – 14. The State alleged the following facts giving rise to Petitioner's arrest:

On March 26, 2015, law enforcement found methamphetamine in a room where Petitioner was supposedly living. App. 8 l. 1 – App. 9 l. 13. According to the assistant solicitor, Petitioner claimed ownership of the methamphetamine. Id. Additionally, on May 23, 2016, the State claimed that law enforcement saw a marijuana plant and methamphetamine in an apartment where Petitioner and a co-defendant, Daniella Curtiss, resided. Id.; App. 90 ll. 1 – 20.

Following the State's rendition of the allegations, plea counsel spoke briefly and remarked on Petitioner's high intelligence and understanding of the case. App. 10 l. 5 – App. 11 l. 6. As mentioned, the plea judge only accepted his plea in passing and never found that it was entered into knowingly, voluntarily, or intelligently. The plea judge sentenced Petitioner to nine years on each of the three charges; the sentences were crafted to run concurrently. App. 11 ll. 13 – 14.

Petitioner filed a timely application for post-conviction relief on December 27, 2017. App. 13 – 68. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to acquire discoverable materials under Brady v. Maryland[1] and counsel accepted a plea agreement which was unfavorable to Petitioner. The State made its Return on or about March 14, 2018. App. 69 – 75.

An evidentiary hearing took place on July 31, 2018 before the Honorable William McKinnon. App. 76. Leah Moody represented Petitioner, and Janell Gregory appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

At the outset of the hearing, PCR counsel noted the nine year sentence on possession with intent to distribute marijuana exceeded the statutory maximum. App. 80 l. 16 – App. 81 l. 17. The PCR judge agreed that this was "clearly an illegal sentence." App. 81 ll. 18 – 20. Under S.C. Code Ann. § 17-27-80, the State suggested that this predicament could be remedied by an Order from the PCR court. App. 82 ll. 1 – 22. The PCR court corrected the sentence to five years. App. 83 l. 22 – App. 84 l. 10.

The remaining claims of ineffective assistance of counsel were taken under advisement at the conclusion of the evidentiary hearing. App. 141 ll. 18 – 19. An Order Granting Partial Relief was filed on September 12, 2018. App. 143. The Order noted the aforementioned due process violation regarding the illegal sentence but denied relief on the remaining allegations. App. 150.

This Petition follows.

---

[1] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)

ARGUMENT

The PCR court erred in denying relief, where plea counsel failed to obtain laboratory testing documents which showed that evidence used against Petitioner contained no controlled substances, where plea counsel also failed to obtain a statement from Petitioner's co-defendant allegedly implicating him, and where plea counsel failed to intervene when Petitioner received four more years than the lawful maximum as part of a negotiated plea.

Relevant facts

Petitioner's plea was never found to be knowingly, voluntarily, or intelligently made by the plea judge, and for good reason. His plea counsel failed to acquire the full discovery from the State, including an exculpatory laboratory report showing that some of the evidence used against him contained no controlled substances and a statement from his co-defendant which would have assisted Petitioner in choosing whether to plead or go to trial.

For the first few months after he was arrested, Petitioner was originally represented by Harry Collins. App. 85 ll. 9 – 24. Collins was relieved, and plea counsel was appointed to represent Petitioner. Id. Petitioner recalled that plea counsel began representing him "[s]ome time in August," before Petitioner had a court appearance. Id. Petitioner described his first impression of plea counsel following their first and only telephone call:

> I spoke with [plea counsel] one time on the phone. He said that he hadn't received anything of my file yet and that he was busy, not to contact him, he would contact me when he got a hold of the file, and he never contacted me.

App. 86 ll. 4 – 10. After the initial telephone call, Petitioner traveled to his home in Oklahoma in December 2016. App. 86 l. 11 – App. 87 l. 7. Before and during his visit to Oklahoma, Petitioner never had any other conversations with plea counsel, never had any court appearances,

and never received his discovery. Id.; App. 88 ll. 14 – 21. Petitioner indicated that he left messages with plea counsel because plea counsel "doesn't answer his phone." Id.

After Petitioner was extradited from Oklahoma, he received partial discovery. App. 87 ll. 8 – 17. As part of a separate civil asset forfeiture action, Petitioner received a laboratory report indicating that eleven grams of a crystal substance previously believed to be methamphetamine actually contained no controlled substances. App. 87 l. 8 – App. 88 l. 8. When Petitioner asked plea counsel about these documents, counsel indicated that he had neither provided them to Petitioner nor received them from the State. Id. Plea counsel admitted that he was not aware of the lab report until he received it from Petitioner. App. 124 ll. 4 – 14. It was at this time that plea counsel suggested that the lab report did not matter because he had already negotiated a plea. App. 101 ll. 3 – 9. Notably, plea counsel's remarks were rather coercive: "Um, he said he'd already negotiated a plea, that we could either go forward with it at this point in time or on Monday we'd go to trial." Id. Petitioner was left without much of a choice.

After Petitioner was extradited, Petitioner attempted to provide his recollection of the facts to plea counsel. App. 90 l. 1 – App. 91 l. 12. Petitioner indicated that at that time, plea counsel did not have any discovery from the State. Id. Petitioner described plea counsel's demeanor as agitated and noted that plea counsel told to "just listen to what I got to say, shut up or I'll walk out of here." Id.

Petitioner's co-defendant Daniella provided a statement under oath, seemingly when she pleaded guilty. App. 102 l. 6 – App. 103 l. 25. When plea counsel informed Petitioner that she was going to testify against him, Petitioner requested a copy of her statement. Id. However, plea counsel never obtained a copy of the transcript from Daniella's guilty plea such that Petitioner could decide whether he wanted to go to trial and if so, develop a trial strategy. Id. Petitioner

noted that after Daniella offered to testify against him, her sentence was reduced from twelve years to seven. Id. At her guilty plea, months before Petitioner's, Daniella supposedly stated that Petitioner had knowledge about the drugs in the apartment. Id. Even after Petitioner requested a copy of the transcript, plea counsel never obtained it for him. Id.

Petitioner cogently expressed his dissatisfaction with plea counsel's representation and noted that he would have requested a trial had he known that plea counsel would have failed to zealously represent him. App. 96 l. 24 – App. 97 l. 8. Petitioner only pleaded guilty on the advice from plea counsel. App. 98 ll. 8 – 17. Plea counsel had another trial scheduled simultaneous to Petitioner's plea as well as a family function in New York. App. 104 ll. 10 – 20. As a result, the two never discussed trial strategy and defenses. App. 104 ll. 21 – 25. Additionally, the two never discussed Petitioner's prior record. App. 110 ll. 19 – 21.

Discussion

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. 2052; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson, 325 S.C. at 186, 480 S.E.2d at 735.

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. See Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Rule 71.1(e), SCRCP. This court gives great deference to the PCR court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 560 n. 2, 455 S.E.2d 686, 688 n. 2 (1995). If matters of credibility are involved, this court gives deference to the PCR court's findings because this court lacks the opportunity to observe the witnesses directly. Solomon v. State, 313 S.C. 526, 530, 443 S.E.2d 540, 542 (1994), overruled on other grounds by State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). If there is any probative evidence to support the findings of the PCR court, those findings must be upheld. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Likewise, a PCR court's findings should not be upheld if there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996).

The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct.App.1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481, (1985). Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Kennerly, 331 S.C. at 453, 503 S.E.2d at 220. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a

request by the accused. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342, (1976).

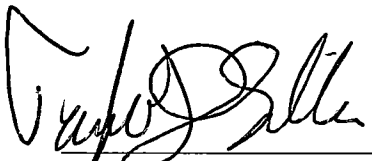
In Brady, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87, 83 S.Ct. 1194. The High Court has since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682, 105 S.Ct. 3375; see also Kyles v. Whitley, 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Id., at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S., at 437, 115 S.Ct. 1555.

Important interests are served when potentially favorable evidence is disclosed, and "the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that is possesses. This requirement is but a small, albeit important; step toward equality of justice." Bagley, supra, 473 U.S. 667, 695, 105 S.Ct. 3375, 3390, 87 L.Ed.2d 481 (1985) (footnote omitted).

Petitioner's frustrations, evidenced at the PCR hearing, plainly reflect the simple steps plea counsel could have taken to remedy the lack of disclosure from the State: "[H]e should've postponed [the plea]; [he] should've filed a motion; ... and he failed to do so." App. 102 ll. 3 – 5. Petitioner received ineffective assistance of counsel where plea counsel failed to investigate Petitioner's case fully and failed to adequately review the matter to ensure that he had a full and complete copy of the discovery and Brady materials. Plea counsel failed to file a Brady motion or bring up the matter before the guilty plea. Once Petitioner informed plea counsel that he had received additional documents from the asset forfeiture action, plea counsel should have realized that his file was likely incomplete. In addition, he should have requested a copy of the transcript from Daniella's guilty plea in order to inform Petitioner of the accusations and testimony being made against him. Plea counsel allowed Petitioner to be sentenced to four year above the maximum for the possession of possession with intent to distribute marijuana charge—it stands to reason that he may have been ineffective in other ways as well.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable William A. McKinnon, Circuit Court Judge

BRETT THOMAS CURTISS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Brett Thomas Curtiss, #373259, at Tyger River Correctional Institution, 200 Prison Road Enoree, SC 23335, this 22nd day of April, 2019.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 22nd day of April, 2019.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.