STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO HORRY COUNTY
Paul M. Burch, PCR Judge

Appellate Case No. 2017-001821

JOHN E. SESSIONS, III

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JACOB A. ISENBERG
Assistant Attorney General
S.C. Bar No. 103830

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

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the PCR court properly found Counsel was not ineffective for failing to advise Petitioner about the collateral consequences of being sentenced to a violent crime, where Counsel and Sessions testified they never discussed the consequences of classification?

STATEMENT OF THE CASE

John E. Sessions, III, was indicted for armed robbery in August 2013. On March 5. 2014, Sessions pled guilty as indicted. The Honorable Edward B. Cottingham sentenced Sessions to imprisonment for twelve years. William I. Diggs (Counsel) represented Sessions at the plea hearing. Sessions did not appeal his plea or sentence.

Sessions commenced this action for post-conviction relief (PCR) on September 5, 2014, alleging claims of ineffective assistance of counsel. The State filed its return on February 4, 2015. An evidentiary hearing was convened before the Honorable Paul M. Burch. Sessions was represented at this evidentiary hearing by Steven W. Fowler (PCR counsel). At the conclusion, the PCR court took this matter under advisement. Thereafter, the PCR court denied relief and dismissed the action with prejudice by written order September 5, 2018. (App. 93-100). Sessions initiated this appeal on October 9, 2018.

STATEMENT OF THE FACTS

John Sessions, III, entered Heidemarie Young's house uninvited with a mask on. Thereafter, Sessions drew what appeared to be a gun on Young. Sessions began repeatedly telling Young he did not want to hurt her. Young initially recognized his voice based upon prior interactions.[1] She then recognized Sessions' statute despite his face being covered.[2]

Sessions began leading Young around her own home. During that time, Sessions repeatedly ask her to give him money. Young did not comply. Sessions then let go of Young, and entered a bedroom on his own. In response, Young ran to a neighbor's house. Sessions unsuccessfully chased her, and then disappeared. The entire incident lasted about two minutes with no items of value ultimately being stolen.

Sessions later made a full confession to police which included admitting he entered the house with intent to steal.

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[1] Sessions worked for a flooring company that completed a project in Young's home. During that time, Young had several conversations with Sessions after serving coffee and other breakfast items.

[2] Young remembered him being a pretty big person.

ARGUMENT

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 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (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, questions of law are reviewed de novo without deference to the lower court. Id. 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).

I. Whether the PCR court properly found Counsel was not ineffective for failing to advise Petitioner about the collateral consequences of being sentenced to a violent crime, where Counsel and Sessions testified they never discussed the consequences of classification?

Sessions' argument, that Counsel was ineffective for a failure to advise his offense would be classified as violent at SCDC, fails on the merits because Counsel had no duty to advise him on this matter.

A defendant need not be informed of collateral consequences of sentencing in order to knowingly, intelligently, and voluntarily enter a guilty plea. Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609-10 (2004) (reaffirming parole eligibility is a collateral consequence where counsel has no duty to advise). Plea counsel has no duty to inform an applicant about collateral consequences. Page v. State, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005) (finding future civil proceedings are not a direct consequence of pleading guilty); See Randall, 356 S.C. at 641, 591 S.E.2d at 609 (reaffirming parole eligibility is a collateral consequence where counsel has no duty

to advise); See Smith v. State, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997) (finding the consequences of pleading to a violent crime are collateral so counsel had no duty to advise); See Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475 (2002) (finding release under community supervision is a collateral consequence where counsel has no duty to inform). However, counsel has a duty not to misadvise a defendant on collateral consequences. Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003) (finding advice which made applicant believe he would be eligible for parole could affect the validity of the plea entered). Like parole eligibility, the violent or non-violent status of an offense is considered a collateral consequence. Smith v. State, 329 S.C. 280, 285, 494 S.E.2d 626, 629 (1997).

On appeal, Sessions does not allege Counsel misadvised him. Instead, Sessions alleges Counsel failed to advise him his conviction could be independently classified as violent by SCDC. Sessions argues Counsel had a duty to advise him SCDC could independently classify someone as a violent or non-violent offender. However, errors committed in the CDR code have no impact on a crime's classification as violent or nonviolent. State v. Bennett, 375 S.C. 165, 173, 174, 650 S.E.2d 490, 495 (2007). Moreover, the "South Carolina Code of Laws is the controlling authority for classifications, definitions, and penalties for criminal offenses, a statute listed on a sentencing sheet, and not a CDR code, will dictate a criminal's sentence." Id. Therefore, the advice Sessions retroactively seeks from Counsel is inaccurate.

Sessions likens his case to Sprouse v. State, 355, S.C. 335, 585 S.E.2d 278, 281 (2003). However, Sessions' reliance on the specific performance requirement in that case is misplaced. The instant case is distinguishable from Sprouse because, in that case, the assistant solicitors deviated from expressly agreed upon terms by classifying the sentence as violent. Sprouse, 355 S.C. at 338, 585 S.E.2d at 280. Here, there is no evidence to reasonably infer Counsel negotiated

violent or non-violent classification with the Assistant Solicitor. At the plea hearing, the Assistant Solicitor stated the negotiation was for twelve years in exchange for dropping charges of first degree burglary, kidnapping, and possession of a weapon during a violent crime, and criminal conspiracy. (App. 9, L. 3-11). At the evidentiary hearing, Counsel testified to the following:

> I never told him that he was going to get a nonviolent sentence in his case.

(App. 84, L. 25) (App. 85, L. 1). Accordingly, these facts do not contain deviation from expressly agreed upon terms so this case does not mandate specific performance.

There is evidence to support a non-violent classification was checked on the sentencing sheet. (App. 101). However, Sessions testified he signed the sentencing sheet as follows:

> [Counsel] walked in that room, laid that paper down and said, this is what the State's offering, either take this plea or we're going to trial. And if I'm not mistaken, the judge even brought it to an exact date and told me the following Monday, so it was on a Thursday, if I'm not mistaken. So I went from Thursday to we're going to trial on Monday if [I] don't sign this paper.
>
> So I read the paper, I looked at it very carefully. And like I said, I don't have very much an education, but I examined the paper very carefully. The paper says I'm pleading to 12 years non-violent, a negotiated plea, or – yeah, if I'm not mistaken, it was a negotiated plea, but – so I signed the paper. I take the 12 years nonviolent.

(App. 50, L. 16-25) (Tr. 51, L. 1-5). This testimony does not indicate they discussed the significance of non-violent or violent classification. Moreover, Sessions later testified to the following:

> PCR counsel: So, in summary, you're saying that your attorney didn't go over these lines, nonviolent – he didn't go over nonviolent with you; did he, versus violent?
>
> Sessions: Negative.

(App. 55, L. 13-6). To reiterate, Counsel testified he never told Sessions the sentence would be classified as non-violent. (App. 84, L. 25) (App. 85, L. 1). Further, the PCR court expressly found this testimony from Counsel to be credible. (App. 98). Accordingly, the record has a sufficient evidence to uphold the PCR court's finding that Counsel was not deficient.

As for prejudice, Rose was not prejudiced by trial counsel's alleged deficiency because he was not entitled to be advised on these collateral consequences. Collateral consequences can be defined as those in the jurisdiction of the Board of Probation, Parole, and Pardon as opposed to the plea court. Smith, 329 S.C. at 286, 494 S.E.2d at 629. A defendant "need not be affirmatively informed" about the collateral consequences of a violent crime. Smith, 329 S.C. at 284, 494 S.E.2d at 629.

The South Carolina Supreme Court specifically listed several consequences to be considered collateral with violent crimes:

> There are a number of consequences if defendant is convicted of a violent crime. Among these are his preclusion from the pretrial intervention program, the supervised furlough program, and the Shock Incarceration Program. Other consequences include tougher standards for parole, limitations of furlough, and work release, and unavailability of educational credits. Additionally, one convicted of a violent crime may not become licensed as an embalmer or funeral director, or registered professional engineer, associate professional engineer, or professional land surveyor. We find that none of the above consequences are of greater significance than parole eligibility. Because we have deemed parole eligibility to be a collateral consequence, then, a *fortiori*, the above-named consequences are collateral as well.

Smith, 329 S.C. at 284-5, 484 S.E.2d at 628-9.

At the evidentiary hearing, Sessions specifically listed the issues he had with not being advised about violent crime consequences:

> People with nonviolent sentences are eligible for parole. People with nonviolent sentences are eligible for good time, work credits, education credits. People on violent sentences don't get any of that.

(App. 51, L. 11-6). The failure to qualify for parole, work credits, and educational credits are specifically recognized collateral consequences of a violent crime. Therefore, Sessions had no right to be advised about the consequences he believes ultimately would have altered his decision to go to trial.[3] As a result, Sessions was not prejudiced by a lack of knowledge about collateral consequences. Smith, 329 S.C. at 286, 494 S.E.2d at 629. Accordingly, there is evidence to support the PCR court's finding that Sessions did not suffer prejudice.

The instant case is distinguishable from Alexander, Ray, and Hinson which Sessions utilized in support of his attempt to show prejudice. In Alexander and Ray, the applicants suffered prejudice based upon pleading guilty after plea counsel affirmatively misadvised them about the **numerical amount of time** they could face if convicted on all charges at trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991); Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152-3 (1991). In Hinson, the applicant suffered prejudice based upon pleading guilty after plea counsel affirmatively misadvised him about the **mandatory incarceration** to be served before parole eligibility. Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989). Here, Sessions testified Counsel did not discuss the meaning of violent and non-violent classifications with him. (App. 55, L. 13-6). Therefore, the facts of this case do not support a finding of prejudice based upon reliance on affirmative misadvice.

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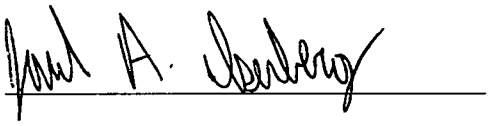
[3] In Smith, the S.C. Supreme Court overturned a grant of relief which was partly-based on the failure to advise about eligibility for good-time credits when pleading guilty to a violent offense. Smith, 329 S.C. at 282, 484 S.E.2d at 627. Accordingly, good-time credits are a collateral consequence of pleading guilty to a violent offense.

Finally, Sessions suffered no prejudice because he did not rely on advice about SCDC classification. Smith, 329 S.C. at 286, 494 S.E.2d at 629. Sessions testified he never discussed the CDR code's role in classifying crimes at SCDC. (App. 52, L. 15-9). Further, he testified Counsel never discussed the classification system at SCDC. (App. 54, L. 9-12). As result, there is evidence to support the PCR court's finding that Sessions did not suffer prejudice.

CONCLUSION

Based on the foregoing argument, plea counsel was not ineffective. Plea counsel did not render deficient performance, nor did Sessions suffer prejudice from any of the alleged deficiencies. Therefore the State requests certiorari be denied.



JACOB A. ISENBERG
Assistant Attorney General

Post Office Box 11549
Columbia, S.C 29211
(803) 734-4276

ATTORNEY FOR RESPONDENT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201

This 3rd Day of October, 2019.

EVA COOK
Legal Assistant for Respondent