

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 01 2019

S.C. SUPREME COURT

CERTIORARI TO BEAUTFORT COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001933

DeAngelo Mickell,Petitioner,

v.

State of South Carolina,Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
SC Bar #79054

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

RESPONDENT’S QUESTION PRESENTED1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS4

STANDARD OF REVIEW5

ARGUMENT

 The PCR court correctly found plea counsel was not constitutionally
 ineffective for advising Petitioner to enter into a plea agree waiving
 his right to file a direct appeal and post-conviction relief where
 Petitioner had no valid defense to the search warrant through which
 the evidence against him was obtained, and therefore, Petitioner’s
 entry of the guilty plea and waiver of rights was knowing and
 voluntary.7

CONCLUSION.....12

RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find plea counsel was not constitutionally ineffective for advising Petitioner to enter into a plea agree waiving his right to file a direct appeal and post-conviction relief where Petitioner had no valid defense to the search warrant through which the evidence against him was obtained, and therefore, Petitioner's entry of the guilty plea and waiver of rights was knowing and voluntary?

STATEMENT OF THE CASE

DeAngelo Mickell (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the State Grand Jury Clerk of Court. Petitioner was indicted at the May 2009 term of the State Grand Jury for: Count I – conspiracy to traffic cocaine greater than 400g and Count XVII – trafficking cocaine 200 - 400g (2009-GS-47-0005). Petitioner was represented by Anthony O. Dore, Esquire (Counsel). On January 25, 2010, Petitioner pleaded guilty before the Honorable Carmen T. Mullen to the lesser-included offenses of conspiracy to traffic cocaine 28-100g and trafficking cocaine 28-100g. Sentencing was deferred. On April 29, 2010, Judge Mullen sentenced him to concurrent periods of confinement for eighteen years on each charge. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief (PCR) on March 31, 2011. Respondent filed a return on September 28, 2012, requesting an evidentiary hearing be convened. James A. Brown, Jr., Esquire, was retained to represent Petitioner. Respondent filed an amended return and motion to dismiss on April 1, 2013, arguing Petitioner waived his right to PCR as part of his plea agreement. A hearing was convened on the motion at the Colleton County Courthouse on May 7, 2014, before the Honorable Perry M. Buckner. After hearing arguments, Judge Buckner dismissed the application and denied relief.

Petitioner then filed a notice of appeal challenging whether the PCR court properly dismissed the application. A petition for writ of certiorari was filed on March 4, 2015. Respondent filed a return on March 17, 2015. The South Carolina Supreme Court issued an opinion reversing the dismissal and remanding the case to the PCR court in light of its recent holding that applicants who waive PCR are able to challenge the advice received in agreeing to waiver. Mickell v. State,

2015-MO-037 (S.C. Sup. Ct. filed June 24, 2015). The remittitur was returned to the circuit court on July 13, 2015.

Thereafter, hearing convened on October 19, 2016, at the Beaufort County Courthouse before the Honorable Michael G. Nettles. Petitioner was present and represented by James A. Brown, Jr., Esquire. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the PCR hearing, Petitioner testified on his own behalf. Petitioner's counsel, Anthony O. Dore, Esquire; his mother, Ophelia Mickell; and Lieutenant Christopher Sankowski of the Beaufort County Sheriff's Office also testified. Judge Nettles denied relief and dismissed the action by written order filed December 8, 2017.

Petitioner filed a timely notice of appeal of the decision denying relief. Through counsel, Taylor D. Gilliam of the South Carolina Office of Indigent Defense – Appellate Defense Division, he filed a petition for writ of certiorari on June 12, 2019.

STATEMENT OF THE FACTS

Petitioner's charges stem from his involvement dealing drugs from his mother's home on Hilton Head. Petitioner's codefendant, Abigail Maillefert, began purchasing cocaine from Petitioner's mother, Ophelia Mickell, in December 2006, and she continued to do so until June 2008. During that time period, Maillefert purchased between 4 to 8 grams of cocaine from Ophelia Mickell a couple times per week. Maillefert observed that if she arrived to buy the cocaine and Ophelia did not have any, Deangelo would arrive at the home, and then Ophelia would have more product to sell. In total, Maillefert purchased over 144 grams of cocaine from the Mickells. App. pp. 3-4.

The Beaufort County Sheriff's Office and the State Law Enforcement Agency (SLED) formed a joint task force and conducted surveillance on Ophelia Mickell's residence. On September 17, 2008, officers observed Petitioner carry a container from the home to the trunk of a Dodge Intrepid parked outside, which he had been driving earlier that day. A search warrant was obtained for Ophelia Mickell's residence, including any cars and outbuildings on the property. The container was ultimately determined to contain 355 grams of cocaine. App. pp. 3-4, 134, 256.

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 (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).

In a post-conviction relief action, a petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that 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). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Petitioner 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, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 688.

ARGUMENT

The PCR court correctly found plea counsel was not constitutionally ineffective for advising Petitioner to enter into a plea agree waiving his right to file a direct appeal and post-conviction relief where Petitioner had no valid defense to the search warrant through which the evidence against him was obtained, and therefore, Petitioner's entry of the guilty plea and waiver of rights was knowing and voluntary.

The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced, by Counsel's advice to waive his right to a direct appeal and post-conviction relief and enter a guilty plea to the charges. Petitioner alleges Counsel was deficient because Counsel did not have all of the evidence Petitioner needed in order to make an informed decision about whether to accept the plea offer. Specifically, Petitioner argues evidence obtained afterwards created an issue as to the validity of the search warrant, and Petitioner contends if he had known he could challenge the search warrant, it would have changed his decision to enter the plea. PWC p. 14. However, the PCR court found Petitioner's testimony on this issue not credible. App. p. 277. Appellate courts give great deference to a PCR court's credibility findings because appellate courts "lack the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). Accordingly, the PCR court correctly found Petitioner failed to meet his burden proof and denied relief. App. pp. 279-80. This Court should therefore deny certiorari as to this issue.

Under South Carolina law, a criminal defendant can choose to waive his right to collateral review of his conviction. 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). However, this Court recently held that while appellate waivers are enforceable, a criminal defendant who has waived his appellate rights is still entitled to raise 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.”). 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).

Petitioner argues Counsel was deficient in advising him to enter the guilty plea and waive his right to a direct appeal and post-conviction relief because Counsel did not have all of the evidence Petitioner needed to make an informed decision about the strength of his case. PWC p. 14. However, at the evidentiary hearing, Counsel testified he specifically discussed the provisions of the plea agreement with Petitioner, including the waiver provisions; he advised Petitioner what PCR was; and Petitioner appeared to understand Counsel’s explanation. App. pp. 157-58. In this case, Petitioner has merged the issue of whether Counsel was constitutionally ineffective in failing to challenge the search warrant with the issue of whether Counsel gave adequate advice regarding whether Petitioner should accept the plea and the waiver. Essentially, Petitioner contends that if he had known he had an arguable challenge to the validity of the search warrant, he would not have waived his right to PCR, would not have pleaded guilty, and would have pursued a trial instead. App. pp. 181-82. The PCR court, however, found this testimony not to be credible. App. p. 277.

Here, Petitioner chose to plead guilty and agreed to waive his appellate and collateral rights in exchange for a more favorable charge – a lesser-included offense which removed a statutory minimum sentence of twenty-five years. App. pp. 155-56. At sentencing, Counsel further explained Petitioner’s motivation “in cooperating with the State [was] so that they would be lenient with his mother.” App. p. 23. Here, both parties received a benefit of the bargain, and the plea

agreement was valid under contractual law. Therefore, Petitioner waived his right to seek PCR, and the PCR court correctly denied relief and dismissed his action.

In any event, Petitioner cannot prove prejudice because he would not have prevailed on the search warrant issue even if Counsel had challenged it. “When the defendant claims that counsel’s failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that should have been excluded.” Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994); see also Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (reversing PCR court’s finding of ineffectiveness because although trial counsel was deficient in failing to preserve the Fourth Amendment issue for appellate review, there was no prejudice to the applicant as the search was lawful). Therefore, before a PCR court can find an applicant has prevailed on a claim of ineffective assistance of counsel for failing to raise a Fourth Amendment challenge to the evidence, the PCR court must determine the underlying claim was meritorious and a reasonable probability exists that it would have changed the result below had the challenge been made. In this case, the PCR court correctly found Petitioner’s claim was not meritorious, and the trial court would not have suppressed the evidence.

“Evidence seized in violation of the Fourth Amendment must be excluded from trial. Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures.” State v. Freiburger, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2005) (internal citations omitted). However, because the ultimate touchstone of the Fourth Amendment is “reasonableness,” the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (citing Katz v. United States, 389 U.S. 347, 357 (1967)). “These exceptions include: (1) search incident to a lawful

arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment.” Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (quoting State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012)).

In this case, Petitioner argues Counsel should have, and would have, moved to suppress the drugs found in the car had Counsel known the “original” search warrant filed with the court did not have the handwritten line, “Included in this warrant are all vehicles, outbuildings, and other structures on this property.” Additionally, Petitioner argues the signatures on the two other copies of the warrant, which do have that handwritten line, are similar, but do not match exactly.¹ Crucially, however, the search of the automobile was performed pursuant to Ophelia Mickell’s consent. App. p. 267. Ophelia Mickell was the registered owner of the car, and therefore, even if Petitioner was the primary driver, she could consent to the search. Although she testified at the PCR hearing the consent form was blank when she signed it, the PCR court found her testimony was “inconsistent, suspect, and not credible.” App. p. 276.

Additionally, even if the consent was somehow invalid, the officers were entitled to search the car pursuant to the automobile exception to the warrant requirement.

Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained. The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation. The automobile exception does not contain a separate exigency requirement. If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.

¹ The record appears to reflect the parties agreed, at the evidentiary hearing, there is a third copy of the search warrant without the handwritten sentence on it, which was signed in blue ink. However, that copy is not included in the Appendix. App. pp. 147-48, 159, 187-88.

State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) (internal citations omitted). In this case, officers surveilling the home ahead of the execution of the search warrant observed Petitioner carrying a container from the house to the car, which later turned out to contain 355 grams of cocaine. This observation provided sufficient probable cause to search the car because officers had information the home was being used to store and distribute drugs, and, within seventy-two hours prior to obtaining the warrant, officers stopped another person leaving the residence who was found to have marijuana and cocaine. App. pp. 3, 252-53.

Thus, the search of the car was valid pursuant to both the consent exception and the automobile exception. Even if Counsel had known about the different versions of the search warrant, Petitioner still would not have had a meritorious argument for suppression of the drugs. He has therefore failed to prove any prejudice resulted from Counsel's advice to accept the guilty plea rather than to challenge the search warrant and proceed to trial.

Because Petitioner has failed to meet his burden as to both deficiency and prejudice regarding Counsel's advice to accept the plea agreement, this Court should deny certiorari.


CONCLUSION

For all the foregoing reasons, the State requests this Court deny the petition for a writ of certiorari and affirm the PCR court's denial of Petitioner's application for relief.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar No. 79054

BY: 
LINDSEY A. MCCALLISTER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

October 28, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

NOV 01 2019

S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001933

DEANGELO MICKELL,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

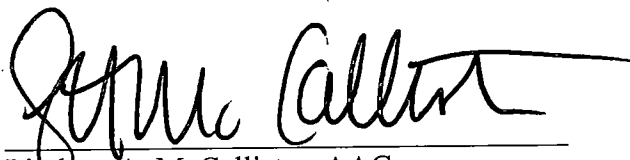
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 28th day of October, 2019.



Lindsey A. McCallister, AAG
for Respondent



RECEIVED

NOV 01 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 28, 2019

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

RE: Deangelo Mickell v. State of South Carolina
Appellate Case No.: 2018-001933

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
S.C. Bar # 79054

LAM/jj
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division