STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
Larry B. Hyman, Post-Conviction Relief Judge
Doyet A. Early, III, Plea Judge

Appellate Case No. 2018-001987

WALLACE GLOVER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL

Trial counsel erred in failing to advise the plea judge at sentencing that per the 2010 amendment to S.C. Code Ann 44-53-375, a distribution of crack cocaine (third offense) conviction now qualifies as a parole eligible offense and a suspendable offense.

RESPONDENT'S STATEMENT OF THE ISSUE

The post-conviction relief court correctly determined Petitioner failed to meet his burden of proof as to ineffective assistance of counsel and denied relief.

a. The post-conviction relief court correctly found Counsel was not constitutionally ineffective for failing to advise the plea court Petitioner's offense was parole eligible since Petitioner knowingly, intelligently, and voluntarily pled guilty to a negotiated plea offer for a ten-year active sentence and Petitioner's colloquy with the plea judge shows he understood he may be required to serve eighty-five percent of his ten-year sentence.

b. Counsel was not constitutionally ineffective for failing to request a suspended sentence during Petitioner's plea hearing as Petitioner was aware he was receiving a ten-year sentence based on plea negotiations with the State at the time he entered his guilty plea freely and voluntarily.

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Aiken County Clerk of Court's order of commitment. Petitioner was indicted at the June 2016 term of the Aiken County Grand Jury for distribution of cocaine base (crack cocaine) (2016-GS-02-00866). Public Defender De Grant Gibbons (Counsel) represented Petitioner. Assistant Solicitor Elizabeth B. Young of the Second Circuit Solicitor's Office prosecuted the case. On March 22, 2017, Petitioner appeared with Counsel before the Honorable Doyet A. Early, III, and pleaded guilty to the offense of distribution of crack cocaine, third offense. Pursuant to negotiations between Petitioner and the State, another drug charge was dismissed in exchange for Applicant's guilty plea. Judge Early sentenced Petitioner to ten years imprisonment. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed his application for post-conviction relief on September 5, 2017, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. "Counsel failed to ascertain and/or inform the court of prior conviction could not be considered."
2. Abuse of Discretion
    a. "The court sentenced was for third offense, one offense was outdated."

On August 18, 2018, Petitioner, through counsel, issued an amended post-conviction relief application alleging:

1. "Glover's plea was not made with or based on advice from competent counsel."
2. "Glover's guilty plea was not intelligently made."
3. "Trial counsel did not prepare [Glover's] case for trial, and Glover was left with no choice but to plead guilty."
4. "Trial counsel did not discuss potential defenses with Glover."
5. "Trial counsel never discussed the advantages and disadvantages of a trial verses the advantages and disadvantages of a plea with Glover so that Glover could make an informed choice of whether to enter a plea or try his case.
6. "Trial counsel did not investigate Glover's case."

7. "Trial counsel erroneously advised Glover that his conviction in this case was a third offense when the present conviction was at most a second offense under S.C. Code § 44-53-470."
8. "Trial counsel erroneously advised Glover that his sentence could not be suspended when S.C. Code § 44-53-375 (B)(3) provides for a suspended sentence when all prior offenses are for possession of a controlled substance."
9. "Trial counsel erroneously advised Glover that his present conviction was non-violent with 65% minimum service requirement instead of 85% minimum service requirement."
10. "Trial counsel erroneously advised Glover that he would be eligible for parole on the present conviction."

An evidentiary hearing into the matter was convened on August 27, 2018, at the Aiken County Courthouse before the Honorable Larry B. Hyman, Jr. Petitioner was present at the hearing and represented by Arthur K. Aiken, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel also testified. By order filed October 8, 2018, Judge Hyman denied and dismissed Petitioner's application for post-conviction relief finding Petitioner failed to demonstrate how Counsel's performance was unreasonable under prevailing professional norms. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari. This return follows.

STATEMENT OF FACTS

On the February 1, 2016, narcotics deputies with the Aiken County Sheriff's Office performed an undercover operation where crack cocaine was purchased from Petitioner. (App. 12.) Deputies developed a confidential informant (CI) who went to Petitioner's residence on Olivia Way in Aiken County and purchased crack. (App. 12.) The CI was wired with surveillance equipment, and he and his vehicle were searched before the controlled buy. (App. 12.) The CI was provided twenty dollars of documented funds from the Aiken County Sheriff's Office for the transaction. (App. 12.) The CI went to the residence where a hand-to-hand transaction was completed. (App. 12.) Petitioner was given the twenty dollars and in exchange provided the CI with a quantity of crack. (App. 12.) The substance was tested and found to be .13 grams of crack. (App. 12.)

The video clearly showed Petitioner's face and Petitioner placing the crack in the CI's hand. (App. 13.) When Petitioner viewed the video of the controlled buy he absconded and was later picked up on a bench warrant. (App. 13.) Petitioner then decided to enter a guilty plea. (App. 13.) An additional prior purchase between Petitioner and the CI took place on January 26, 2016, and that charge was dismissed in exchange for the guilty plea. (App. 12-13.)

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 give great deference 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 179 (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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. 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, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood, 338 S.C. at 109, 525 S.E.2d at 517; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant 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 [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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). The applicant 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, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 385 S.E.2d at 625. 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, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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 defendant 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 668.

ARGUMENT

The post-conviction relief court correctly determined Petitioner failed to meet his burden of proof as to ineffective assistance of counsel and denied relief.

a. The post-conviction relief court correctly found Counsel was not constitutionally ineffective for failing to advise the plea court Petitioner's offense was parole eligible since Petitioner knowingly, intelligently, and voluntarily pled guilty to a negotiated plea offer for a ten-year active sentence and Petitioner's colloquy with the plea judge shows he understood he may be required to serve eighty-five percent of his ten-year sentence.

Petitioner alleges the post-conviction relief court erred in refusing to find Counsel constitutionally ineffective for failing to advise the plea judge that S.C. Code Ann. §44-53-375 allowed Petitioner to qualify for parole eligibility. However, as the post-conviction relief court correctly found Petitioner understood he may have to serve eighty-five percent of his sentence prior to entering his guilty plea. Petitioner testified he understood his sentence could be an eighty-five-percent, no parole sentence and still proceeded to enter his *negotiated* guilty plea knowingly and voluntarily. (App. 7.) Accordingly, the post-conviction relief court properly denied Petitioner relief and this Court should deny certiorari.

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. Further, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "In considering an allegation on PCR that a guilty plea was based on inaccurate

advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

During the plea colloquy with Petitioner, the plea court and Petitioner had the following exchange:

> **Court:** There's a possibility, depending on what your prior offenses were, that this could be an 85-percent, no-parole sentence. So if you got a ten-year sentence, you'd have to do eight and a half years before you were eligible for release into a community supervision program. Or, as [Counsel] has shown you, under the statute, if the prior offenses did not deal with distribution or simple possession, that may not be applicable to you. Do you understand that?
>
> **Petitioner:** Yes, sir, Your Honor.

(App. 7.) This exchange also shows Petitioner was aware of the possibility his offense could be an eighty-five-percent, no-parole offense, and Petitioner still elected to continue with his guilty plea. Petitioner was given the opportunity to ask the plea court questions regarding his charge and sentence and Petitioner testified he did not have any questions. (App. 8.) The plea court then asked:

> **Court:** Understanding what you're charged with, the possible sentence, the possibility of it being no-parole, 85-percent sentence, this is your strike, and one more strike will subject to the possibility of life in prison without parole, how do you wish to plead to this particular charge in front of me today?
>
> **Petitioner:** Guilty, sir, Your Honor.

(App. 8.) The record clearly shows Petitioner was fully aware that his charge could be an eighty-five-percent, no parole sentence and still elected to proceed in entering his guilty plea.

Additionally, Petitioner has failed to establish any resulting prejudice from Counsel's alleged deficiency. Petitioner argues there is a "reasonable probability" that his sentence would be different had Counsel correctly informed the plea court regarding Petitioner's parole eligibility. However, that argument is unreasonable because the plea court did not impose an eighty-five percent, no parole sentence; the plea court simply informed Petitioner his sentence *could be* an eighty-five-percent, no parole sentence depending on his prior convictions. Further, Petitioner's plea was *negotiated* for an active ten-year sentence, which is exactly the sentence he received.

The record shows Petitioner had a clear understanding of his charge and the consequences of his plea. The colloquy made it clear Petitioner was aware his offense may be an eighty-five-percent, no-parole offense, which Petitioner acknowledged he understood before entering his *negotiated* guilty plea. As such, the post-conviction relief court correctly found Counsel was not constitutionally ineffective as to this allegation because Counsel was not deficient and Petitioner failed to prove any resulting prejudice from Counsel's alleged deficiency. Therefore, the post-conviction relief court properly denied Petitioner relief. This Court should deny certiorari.

b. The post-conviction relief court properly found Counsel was not constitutionally ineffective for failing to request a suspended sentence during Petitioner's plea hearing as Petitioner was aware he was receiving an active ten-year sentence based on plea negotiations with the State at the time he entered his guilty plea freely and voluntarily.

Petitioner alleges the post-conviction relief court erred in finding Counsel was not constitutionally ineffective for failing to request Petitioner's sentence be suspended at his guilty plea hearing. However, Counsel testified Petitioner's plea was negotiated with the State where Petitioner would plead guilty to one of his charges and receive the minimum ten-year sentence and the State would dismiss Petitioner's second charge. (App. 56-57.) Petitioner pleaded guilty

knowing he was going to receive a ten-year active sentence. Petitioner was also aware he could possibly serve eighty-five percent of that sentence. Counsel testified Petitioner received the sentence they anticipated based on plea negotiations with the State. (App. 61.) Accordingly, the post-conviction relief court properly denied Petitioner relief on this allegation and this Court should deny certiorari.

Strickland requires Petitioner to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Here, Petitioner has failed to show Counsel's assistance fell below the reasonableness standard set forth in Strickland. As Counsel testified, the State offered Petitioner a *negotiated* ten-year sentence on one of his indictments and, in exchange for the plea, agreed to dismiss Petitioner's second indictment. (App. 58.) Counsel read an e-mail he received from the State that stated in part, "[M]y offer is for him to plead to one count as indicted for a negotiated 10-year sentence, which is the minimum. I will *nolle pros* the other indictment." (App. 58.) Counsel testified the negotiated ten-year sentence is all he, Petitioner, and the State had discussed. (App. 58.) Based on their discussions, Counsel understood the negotiation to be for a ten-year active sentence and, therefore, did not request a suspended sentence during the plea hearing. Counsel testified, "The law does not prohibit [a suspended sentence]. But that was not the offer we were all under the understanding was being made to [Petitioner]." (App. 63.) Counsel further testified, "[Petitioner] got his ten-year sentence, which is what we all had anticipated him getting." (App. 61.) Petitioner's own testimony shows he was expecting to

receive a ten-year sentence. Petitioner testified, "It was a - - plea from - - from ten to thirty. I was to receive on the lower end, which was ten years[.]" (App. 37.) Counsel cannot be found to have made "errors so serious" that he failed to function as counsel when Petitioner, by his own admission, received the negotiated sentence he expected to receive. Strickland, 466 U.S. at 697.

Additionally, as this Court found in State v. Ray, trial judges are presumed to know the law. 310 S.C. 431, 437, 427 S.E. 2d 171 (1993) (internal citations omitted). Here, the PCR judge properly pointed out the plea judge was an experienced judge, and there was nothing in the record to suggest the plea judge was not fully aware of the statute and the possibility that Petitioner's sentence could be suspended if Petitioner was eligible. (App. 68, 71.) However, the plea judge imposed the ten-year negotiated sentence as active time, which, according to Counsel's testimony, was what he and Petitioner expected.

After hearing all of the testimony at the evidentiary hearing, the PCR judge also properly found, ". . . [Petitioner] went into this plea expecting a ten-year sentence, which is a lawful sentence. . . no one disputes the fact that [Petitioner] pled guilty, expecting to receive ten years[,]" which is exactly the sentence that was imposed. (App. 67-68.) Further, as highlighted in the above section, the plea judge explained to Petitioner that if he received a ten-year sentence, he could have to do eight-and-a-half years before becoming eligible for parole. (App. 7.) Petitioner testified he understood and knowingly and voluntarily continued with his plea. (App. 7.) Petitioner cannot show deficiency on behalf of Counsel when the plea judge accepted the negotiated plea and imposed the ten-year sentence Petitioner, Counsel, and the State expected.

Petitioner has failed to show this Court any deficiency on behalf of Counsel as to either of his allegations. As to the first allegation, the record supports the PCR court's finding that Petitioner knowingly, intelligently, and voluntarily entered his guilty plea with a full

understanding of the consequences of his plea. Additionally, Counsel was not deficient for failing to request a suspended sentence in Petitioner's case because Petitioner entered a negotiated plea agreement for an active sentence of ten years, which is exactly the sentence he received. Further, Petitioner has failed to establish any resulting prejudice from Counsel's alleged deficiencies as it is unreasonable to believe Petitioner would have elected to go to trial on two charges rather than enter his negotiated guilty plea on one of his charges especially considering the strong evidence against him. During the guilty plea, Counsel explained Petitioner "never really thought this was a triable, winnable case." (App. 14.) Accordingly, Petitioner has failed to meet his burden as set forth in Strickland and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: _____
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November 19th, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM AIKEN COUNTY
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Larry B Hyman, Post-Conviction Relief Judge

Appellate Case No. 2018-001987

WALLACE GLOVER,

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v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Kaitlyn S. Slice, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 18th day of November, 2019.

Kaitlyn A. Slice

KAITLYN S. SLICE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

November 18, 2019

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

Re: **Wallace Glover v. State of South Carolina**
Appellate Case No. 2018-001987
Lower Court Case No. 2017-CP-02-2128

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/ks
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)