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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Trial Judge
The Honorable Grace G. Knie, PCR Judge

Appellate Case No. 2019-000770

SCOTTY M. BROWN.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Although counsel did not advise petitioner of the date on which he would become parole eligible; nonetheless, counsel erred in advising petitioner that his parole eligibility dates on all sentences received would match identically and fall due on the same date because this was incorrect advice regarding parole eligibility.

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly find that Petitioner failed to establish Counsel was constitutionally ineffective in advising Petitioner regarding his parole eligibility where the record establishes that Counsel provided proper advice to Petitioner and Petitioner freely, intelligently, knowingly, and voluntarily entered his guilty pleas to the various offenses?

STATEMENT OF THE CASE

Scotty M. Brown (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its May 2014 term, the Spartanburg County Grand Jury indicted Petitioner for two counts of Distribution of Heroin (2014-GS-42-1814 and -1815). During its September 2014 term, the Spartanburg County Grand Jury indicted Petitioner for Trafficking in Heroin (2014-GS-42-3942), Possession of Pistol with Altered/Destroyed Serial Numbers (2014-GS-42-3943), and Possession of Cocaine (2014-GS-42-4458).

On April 1, 2015, the Petitioner pled to before the Honorable J. Derham Cole to the two counts distribution of heroin, second offense (-1804 and -1805). Petitioner was represented by Fletcher N. Smith, Jr., Esquire, and John Clifford Strickland, Esquire, (hereafter "Counsel"). Assistant Solicitor George Matthew Kendall, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. Judge Cole sentenced Petitioner to ten years' imprisonment, with sentences running concurrently. Counsel filed a motion to reconsider on April 3, 2015, moving the Court to give Petitioner credit for time served in jail, as well as on Home detention and GPS monitoring. Petitioner did not appeal his guilty plea or sentence.

On August 25, 2015, Petitioner pled to a negotiated plea deal on the trafficking charge (-3942) to distribution of heroin, third offense. Petitioner was represented by Fletcher N. Smith, Jr., Esquire, and John Clifford Strickland, Esquire, (hereafter "Counsel"). Assistant Solicitor George Matthew Kendall, Esquire, and Hunter Christopher Blouin, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. Pursuant to the State's recommendation, Judge Cole sentenced Petitioner to seventeen years' imprisonment, running concurrently with his prior sentences. Petitioner did not appeal his guilty plea or sentence.

On November 16, 2015, Petitioner pled guilty as indicted to possession of cocaine, third offense (-4458) and possession of a weapon with an obliterated serial number (-3943) before the Honorable Roger L. Couch. Petitioner was represented by John Strickland, Esquire (hereafter "Counsel"). Assistant Solicitor Matt Kendall, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. Pursuant to the State's recommendation, he was sentenced to ten years' imprisonment, running concurrently with the prior sentence. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed a post-conviction relief (hereafter "PCR") application on March 16, 2017, alleging ineffective assistance of counsel, involuntary guilty plea, and after discovered evidence. Respondent made its return on September 7, 2017. The evidentiary hearing occurred on June 22, 2018, before the Honorable Grace Gilchrist Knie. Richard W. Vieth, Esquire, was the Petitioner's attorney. Jordan A. Cox, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Petitioner testified that he received a parole eligibility date after pleading guilty on April 1, 2015. (App. 120-23, 148). He testified that he knew parole eligibility is not determined by the circuit court, his attorneys, or the solicitor's office. (App. 120). When Petitioner decided to enter a plea, his attorney told him that the parole date would not change because of the plea. (App. 124-25). That said, when he decided to enter the plea he was not promised a parole date by his attorney. (App. 147). Petitioner was not aware of any change in parole eligibility date until February 2017. (App. 131-33, 143-44). Within a month of this discovery, he filed his PCR application. (App. 135). Petitioner admitted he told every plea hearing judge he was not promised anything in exchange for the plea and was not pressured into taking the plea. (App. 140-41, 151-52). He also said that he knew the judge was not bound to any

recommendations from the State, that he was entering an open plea, and the Judge never said anything at the plea hearing concerning parole eligibility. (App. 149-51). He said he was following Counsel's instructions by pleading to protect his parole eligibility. (App. 140). Further, Petitioner testified that but for the misinformation from his attorney, he would not have taken the plea, but would have gone to trial instead. (App. 140, 153).

Petitioner's mother also testified that Petitioner's attorney told her that pleading guilty would not affect his parole eligibility. (App. 168-69). Petitioner's family friend who was called to be a witness at the trial testified to the same. (App. 176).

One of Petitioner's attorneys, Fletcher Smith, Esquire, testified that the State never made an offer regarding a parole date and he never made any promises to Petitioner regarding a parole date. (App. 182). He also testified that Petitioner was possibly facing life without parole and, consequently, Counsel recommended Petitioner enter a guilty plea and take the seventeen years the State was recommending over proceeding to trial and potentially be sentenced to life imprisonment. (App. 181-82).

Petitioner's other attorney, John Strickland, Esquire, testified he encouraged Petitioner to take the plea so he would not face life imprisonment. (App. 190). He stated that the sentences were to run concurrently. (App. 191). He never advised Petitioner regarding parole eligibility. (App. 191-93).

The PCR court denied the application, finding that Petitioner had not met his burden of proof in demonstrating ineffective assistance of counsel for failure to explain the consequences of the guilty plea and the possible changes to parole eligibility. (App. 224). Additionally, the court found the plea was made knowingly, voluntarily, and upon sound advice from Counsel. (App. 225).

On May 9, 2019, Petitioner filed a motion to reconsider the judgement, pursuant to Rule 59(e). The State submitted a return on October 23, 2018.¹ A motion hearing was held on March 20, 2019. The court issued an order, denying the motion for reconsideration, filed on May 3, 2019.

¹ Respondent's return to the motion for reconsideration was dated 2018 but, based upon the timeline of the 59(e) motion, Respondent now notes that it should have been dated 2019.

STATEMENT OF FACTS

On September 11, 2012, Officers, through use of a confidential informant staged a drug buy consisting of .44 grams of heroin in the area of Spartanburg where Petitioner was working. (App. 9-10). On September 20, 2012, Officers again used the same confidential informant to stage a second drug buy consisting of .55 grams of heroin. (App. 10). On April 17, 2014, a drug buy consisting of 4.94 grams of heroin was staged by the police involving a confidential informant. (App. 34). On July 2, 2014, law enforcement executed a search warrant of Petitioner's residence. (App. 217) In the home, they found a pistol with a serial number obliterated, a bag consisting of .57 grams of cocaine, and some Xanax pills. (App. 52).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRPC; *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). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding or for error of law. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Reviewing courts conduct a de novo review when evaluating questions of law and are required to reverse the lower court when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish constitutionally ineffective assistance of counsel when Counsel erred in advising Petitioner that his parole eligibility dates on all sentences received would match identically because this misinformation did not prejudice Petitioner.

On appeal, Petitioner argues the PCR court erred in denying him relief because of ineffective assistance of counsel. Specifically, Petitioner argues that counsel erred by incorrectly advising him that his parole eligibility dates on all sentences received would match identically and fall on the same date. However, the PCR court properly rejected this argument, finding that Petitioner failed to meet his burden of proof when alleging he would not have taken the plea deal but for Counsel's misinformation concerning parole eligibility. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

Ineffective Assistance of Counsel

Here, Petitioner alleges that Counsel was ineffective for incorrectly informing Petitioner that all of his parole eligibility dates would fall on the same date. In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, which the Supreme Court expanded upon through developing the two-pronged test outlined in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence² that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead,

² Rule 71.1(e) SCRCP.

would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. See *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999). A valid plea requires that the record 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. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made

by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

An applicant can attack the voluntary, knowing and intelligent character of a guilty plea entered on advice of counsel by showing counsel’s advice in taking the plea fell below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 629 S.E.2d 353 (2006). “That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant’s lawyer withstand retrospective examination in a post-conviction hearing.” *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 771.

Here, the plea transcript supports a finding that the plea entry was valid and Petitioner was not prejudiced by any alleged misinformation given regarding parole dates and eligibility. At the April 2015 plea hearing, Petitioner stated he understood the charge would involve between five and thirty years’ imprisonment. (App. 4). At the August hearing, the recommended sentence was seventeen years, but the Judge stated and Petitioner confirmed understanding of the maximum thirty year sentence available. (App. 32). At the November hearing, Petitioner stated that no one made any guarantees or promises regarding parole if he accepted the plea. (Plea Tr. 48). He was also given a recommended sentence of zero to five years on possession of a pistol

and zero to ten on possession of cocaine, which Petitioner, on record, stated he understood. (App. 41-43). At every hearing he confirmed he knew the rights he was giving up, the charges against him, and that he had effective assistance of counsel. (App. 5-13, 29-35, 43-54). Thus, Applicant knew the potential sentences he was going to be facing and decided to go forward with the entering the plea anyway. He also knew nothing was fully established regarding parole eligibility when entered the plea in November. Thus, the plea remains valid and Petitioner cannot rescind it now that he is displeased with parole timing because this was waived when the plea was entered.

Additionally, Petitioner conceded in his petition for writ of certiorari that “Counsel properly and wisely advised petitioner to accept the seventeen-year plea deal on the reduced distribution of heroin charge down from the trafficking charge and thereby avoid an LWOP [life without parole] sentence.” If Counsel “properly and wisely” advised Petitioner to accept the plea, it was still in Petitioner’s best interest to enter a guilty plea over proceeding to trial. Further, through appellate counsel, Petitioner concedes that the plea was still a better alternative than going to trial was, despite the misinformation. In fact, the implication in this statement is that Petitioner would have still entered a guilty plea even if he was not misinformed about parole eligibility. Thus, Petitioner was not prejudiced by Counsel’s misinformation. Petitioner is not entitled to post-conviction relief if he otherwise would have taken the plea. Thus, Petitioner has not met his burden of proof in proving that ineffective assistance of counsel was rendered. Thus, certiorari should be denied and the PCR Court’s finding affirmed.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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