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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Post-Conviction Relief Judge
R. Markley Dennis, Plea Judge

Appellate Case No. 2019-000810

ANTONIO YOUNG, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Whether the PCR court erred in denying relief, where plea counsel failed to advise Petitioner that his guilty plea could result in involuntary commitment for an indeterminate period under the Sexually Violent Predator Act, where Petitioner was transferred to the county jail in accordance with the SVP Act on the date he was scheduled to be released from prison after serving his sentence, and where Petitioner was subjected to trial and possible commitment as a result of his guilty plea?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly find plea counsel was not deficient for failing to advise Petitioner that his guilty plea could result in involuntary commitment under the Sexually Violent Predator Act, where plea counsel had not duty to advise Petitioner as to this collateral consequence?

STATEMENT OF THE CASE

Petitioner was indicted by a Charleston County grand jury in June 2016 for criminal sexual conduct in the first degree. App. 68-69. He appeared before the Honorable Markley Dennis on April 21, 2017 for a negotiated Alford plea. Petitioner was represented by Patty Kennedy; Tyler Whitaker appeared on behalf of the state. App. 1. Counsel had negotiated a three-year sentence on the lesser included offense of assault and battery of a high and aggravated nature. App. 3, l. 23-App. 4, l.1. There were discussions on the record as to the two-year community supervision program, but not as to any potential involuntary commitment through the SVP program.

At the time of the plea, Petitioner had spent over seven hundred days in jail. App. 5, l. 23-25. Plea counsel noted that he was already on the sex offender registry. App. 9, ll. 1-4. Petitioner pleaded guilty under Alford. App. 9, ll. 5-11. Following the plea, the plea judge asked defense counsel whether Petitioner had been advised of his rights as well as the consequences of his plea; she answered in the affirmative. App. 9, l. 25-App. 10, l. 2.

The facts as alleged by the State were as follows: On or about April 1, 2014, Petitioner allegedly sexually assaulted a woman in her home. App. 11, l. 9-App. 12, l. 25. The assistant solicitor described the woman as fragile due to an unrelated traumatic brain injury. Id. Further, she lived out of state and did not wish to testify. Id.

The assistant solicitor noted Petitioner's record. App. 12, l. 13-20. Within the past ten years, according to the state, Petitioner had a sexual registry violation from 2006 and three drug offenses. Id.

At the time of the plea, Petitioner had already been incarcerated for over two years. App. 15, l. 22-App. 16, l. 9. He was forty-five years old, a lifelong resident of Charleston, and had four children and seven grandchildren. App. 17, l. 11-19. His plea counsel remarked that Petitioner was

"at a point in his life that… he's ready to the extent that the system will allow him to… come out and still have enough time in his life to be with his children, be with his grandchildren." Id. According to plea counsel, Petitioner's family was anxious to have him home. Counsel suggested that this plea provided Petitioner "an opportunity to come out in a fairly short period of time and resume his life." App. 17, l. 20-25.

The plea judge asked some additional questions before sentencing Petitioner, including whether Petitioner's record could have been used against him if he testified. App. 18, l. 4-10. No person indicated on the record that Petitioner's conviction could be used to prompt a petition for probable cause determination under S.C. Code Ann. §44-48-70.

The plead judge sentenced Petitioner to three years' incarceration with credit for time served. App. 20, l. 2-9. As a result of the credit, he was only required to serve 160 days in prison. Id. However, the day he was scheduled to be released from the South Carolina Department of Corrections, he was instead transferred to the county jail. App. 52, l. 3-20.

On April 5, 2018, Petitioner filed an application for post-conviction relief. App. 22-29. He alleged that plea counsel failed to advise him of the possibility of being involuntarily committed through the Sexually Violent Predator Act. App. 440, l. 20-App. 41, l. 6. The State filed its Return and Motion for a More Definite Statement on or about June 7, 2018. App. 30-37. An evidentiary hearing was held on March 20, 2019 before the Honorable Jennifer McCoy. App. 38. James Falk represented Petitioner; undersigned counsel appeared on behalf of the State. Plea counsel and Petitioner testified at the hearing. The PCR judge took the matter under advisement. App. 59, l. 5-8. An Order of Dismissal was issued on May 2, 2019. App. 61-67. The PCR judge found that plea counsel's performance was "in accordance with professional norms and that Applicant has failed

to establish any deficiency of counsel." App. 66. Citing Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005), the PCR court found Petitioner failed to meet his burden. App. 66-67.

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. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (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).

ARGUMENT

The post-conviction relief court properly found plea counsel was not deficient for failing to advise Petitioner that his guilty plea could result in involuntary commitment under the Sexually Violent Predator Act, where plea counsel had not duty to advise Petitioner as to this collateral consequence

Petitioner contends the PCR judge erred in denying relief where plea counsel failed to advise Petitioner that his guilty plea could result in involuntary commitment under the Sexually Violent Predator Act. However, the PCR judge properly denied relief where plea counsel had no duty to advise Petitioner as to the potential collateral consequence of commitment under the Sexually Violent Predator Act.

The PCR judge properly relied on Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005) for the notion that counsel has no duty to inform a client about the civil commitment process under the SVPA. App. 66. In Page, this Court analyzed the SVP statutory scheme and concluded that Page's counsel "had no duty to inform him about the civil commitment process under the SVPA" in situation where Page pleaded guilty to criminal sexual conduct and other charges subject to a negotiated agreement. Id. At 637, 615 S.E.2d at 742. The ultimate holding was that "any possible civil commitment of Petitioner would not follow directly from his guilty plea but rather from a separate civil proceeding as a collateral consequence." Id.

Upon a conviction for a sexually violent offense, the following process must begin. S.C. Code Ann. §44-48-40(A). Following the conviction, a multidisciplinary team appointed by the Director of the Department of Corrections receives written notice and records of the individual who received the conviction. S.C. Code Ann. §44-48-50. "The agency with jurisdiction must give written notice to the multidisciplinary team." S.C. Code Ann. §44-48-40. The multidisciplinary team, within thirty days, "must assess whether or not the person satisfies the definition of a sexually violent predator." Id. If that answer is yes, the team "must forward a report of the assessment to the prosecutor's review committee." Id.

The prosecutor's review committee is appointed by the South Carolina Attorney General. S.C. Code Ann. §44-48-60. The committee "must determine whether or not probable cause exists to believe the person is a sexually violent predator." Id. While deliberating, "the committee must also consider the information provided by the circuit solicitor who prosecuted the person." Id.

"When the prosecutor's review committee has determined that probable cause exists to support the allegations that the person is a sexually violent predator, the Attorney General must file a petition." S.C. Code Ann. §44-48-70. The petition "must be filed within thirty days of the

probable cause determination… and must request that the court make a probable cause determination as to whether the person is a sexually violent predator." Id. "The petition must allege that the person is a sexually violent predator and must state sufficient facts that would support a probable cause allegation." Id.

After the petition is filed, "the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator." S.C. Code Ann. §44-48-80. Only after the court determines that probable cause exists is the individual taken into custody. Id. After being taken into custody, the individual must be provided with notice of the opportunity to appear in person at a hearing. If the probable cause determination is made, the court "must direct that upon completion of the criminal sentence, the person must be transferred to a local or regional detention facility pending conclusion of the proceedings." Id. Additionally, the court "must further direct that the person be transported to an appropriate facility of the South Carolina Department of Mental Health for an evaluation as to whether the person is a sexually violent predator." Id.

Soon thereafter, the person is tried. S.C. Code Ann. §44-48-90. If found to be a sexually violent predator, "the person must be committed to the custody of the Department of Mental Health for control, case, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and has been released pursuant to this chapter." S.C. Code Ann. § 44-48-100.

The PCR judge properly denied relief where plea counsel had no duty to advise Petitioner as to any collateral exposure to Sexual Violent Predator proceedings as a result of his guilty plea. First, involuntary civil commitment under the Sexual Violent Predator Act is considered by our courts to be a collateral consequence of a guilty plea, not flowing automatically as a result of the

plea, and thus counsel does not have a duty to advise their client as such. The PCR judge and Petitioner both aptly cited to Page v. State in addressing Petitioner's claim. This Court in Page held that commitment pursuant to the SVP act does not automatically flow from the conviction, rather a civil proceeding entailing testing, evaluation, a probable cause hearing, and a trial. The Court's basis and reasoning for this decision was previously addressed by the Fourth Circuit Court of Appeals in Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364 at 1366. The Court in Cuthrell noted that the commitment "depended not directly on the defendant's plea but on a subsequent, independent civil trial" with independent guarantees of fairness. Further, Petitioner cites to Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (2013) for the similarly consistent holding that "commitment pursuant to the SVP Act does not automatically flow from the conviction, rather a civil proceeding occurs where the defendant is evaluated before confinement is certain." Again, in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the Supreme Court noted that plea counsel was deficient in part because the deportation was presumptively mandatory. Here, Petitioner argues that counsel was similarly deficient in failing to advise him as to exposure under the Sexually Violent Predator Act. However, the only thing mandatory would have been the start of the process under the Act, as the result of the process (involuntary civil commitment) in no way mandatorily or automatically flows from the conviction. Petitioner is correct in arguing that individual steps in the civil proceeding are mandatory, however, the result of the proceeding (as is the focus of the holding in Padilla) is not automatic nor mandatory. Therefore, on this basis alone, the PCR judge properly found that plea counsel was not deficient for failing to advise Petitioner of potential under the Sexually Violent Predator Act as counsel never had a duty to do so.

Second, plea counsel was not deficient for failing to advise Petitioner has to potential exposure under the Sexually Violent Predator Act as the result of any subsequent civil proceeding under the Act is non-punitive, does not affect the range of the sentence, and therefore Petitioner can show no prejudice as it relates to his criminal conviction. The non-punitive nature and specific intent of the Act is outlined clearly in the following holding from the South Carolina Court of Appeals:

> While the Act bestows some of the rights normally associated with criminal prosecutions, it is not intended to be punitive in nature; rather, it sets forth a civil process for the commitment and treatment of sexually violent predators. In re Matthews, 345 S.C. 638, 649, 550 S.E.2d 311, 316 (2001) (noting that, in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the United States Supreme Court deemed Kansas' Sexually Violent Predator Act, on which the South Carolina Act is modeled, to be a civil, non-punitive scheme); In re Care and Treatment of Brown v. State, 372 S.C. 611, 616, 643 S.E.2d 118, 121 (Ct.App.2007). The Act is designed to: (1) meet the special needs of sexually violent predators; (2) address the significant likelihood that they will engage in repeated acts of sexual violence if not treated for their mental conditions; and (3) assess the risks requiring their involuntary civil commitment in a secure facility for long-term control, care, and treatment. Id. at 616–617, 643 S.E.2d at 121 (citing S.C. Code Ann. § 44–48–20 (Supp.2006)).

In re Care & Treatment of Canupp, 380 S.C. 611, 617–18, 671 S.E.2d 614, 617 (Ct. App. 2008). The civil and non-punitive nature of the potential result of the civil Sexually Violent Predator Act process is further evidence that it is a collateral consequence of the guilty plea. "The distinction between direct and collateral consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364 (4th Circ.), cert. denied, 414 U.S. 1005 (1973). This Court has held that "PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence…" Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). After Al-Shabazz, only two non-collateral matters are cognizable in PCR: 1) a claim that the

applicant's sentence expired (Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 158 (2006)) or 2) a claim that the applicant's probation, parole or conditional release has been unlawfully revoked. Id. Therefore, Petitioner has raised a non-collateral, collateral consequence of his guilty plea that does not affect the duration of his punishment. Involuntary civil commitment under the Sexually Violent Predator Act is facially non-punitive in nature and is therefore not considered part of any punishment Petitioner received as a result of his guilty plea. The PCR court properly found plea counsel did not have a duty to advise Petitioner of his possible exposure, as this was a non-punitive collateral consequence of his guilty plea.

In order 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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Where there has been a guilty plea, the applicant must prove counsel's representation fell below the standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). Here, this Court need not proceed to the prejudice prong of the Strickland analysis, as Petitioner has wholly failed to meet his burden in showing any deficiency on the part of counsel. Plea counsel had no duty, based on all existing precedent of the courts of this state, to advise Petitioner as to possible exposure under the Sexually Violent Predator Act. Therefore, the PCR court properly denied relief.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By: s/ Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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