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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
The Honorable Robin B. Stilwell, Plea Judge
The Honorable R. Lawton McIntosh, Post-Conviction Relief Judge

Appellate Case No. 2021-000334

KENDALL DONYALE ARNOLD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUE.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW.....6

ARGUMENT.....7

The post-conviction relief court properly denied relief for the allegation that plea counsel failed to review incriminating photos with Petitioner, because Petitioner failed to prove that plea counsel was deficient or that Petitioner would have insisted on going to trial if not for plea counsel’s deficiency. Finally, Petitioner failed to prove that he was prejudiced by plea counsel’s failure because the plea judge considered the State’s original plea offer when sentencing Petitioner7

CONCLUSION.....12

RESPONDENT'S STATEMENT OF ISSUE

Did the post-conviction relief court properly deny relief for the allegation that plea counsel failed to review incriminating photos with Petitioner when Petitioner failed to prove that plea counsel was deficient? And even if plea counsel was deficient, did Petitioner prove he would have insisted on going to trial if not for plea counsel's deficiency? And finally did Petitioner prove he was prejudiced by plea counsel's failure when the plea judge considered the State's original plea offer when sentencing Petitioner?

STATEMENT OF THE CASE

Petitioner Kendall Donyale Arnold is presently confined in the South Carolina Department of Corrections following his guilty plea in Greenville County. On December 31, 2016, Petitioner committed three armed robberies and one attempted armed robbery involving five different victims. (App. 24). The first accident happened shortly after 6:00 PM in a store parking lot. (App. 24). As two women were exiting their vehicle, Petitioner held the women at gunpoint and demanded their purses. (App. 25). One victim gave Petitioner her purse, keys, and phone, but the other victim pretended she did not have a purse and did not give Petitioner anything (App. 25). The victims said Petitioner was wearing a distinctive, red Adidas sweat suit. (App. 24). Later that evening, Petitioner ran into the victim of the second armed robbery at a gas station. (App. 25). This Victim knew Petitioner from high school and invited Petitioner to his house for a New Year's Eve celebration. (App. 25). At the New Year's Eve party, Petitioner and his codefendants asked victim to step outside his home and they proceeded to rob him of his phone and wallet at gunpoint. (App. 26).

At approximately 9:30 PM a man and a woman were walking to a New Year's Eve party when they were robbed of their liquor and prosecco bottles at gunpoint by Petitioner and his codefendants. (App. 26). At approximately midnight, a highway patrol officer in North Carolina stopped a Ford Escape driven by Petitioner for traveling at 100 miles per hour. (App. 26). Petitioner initially stopped his vehicle but eventually fled and a high speed chase ensued. (App. 27). Petitioner's vehicle eventually crashed into a tree and Petitioner fled the vehicle on foot. (App. 27). Petitioner's girlfriend did not flee the vehicle and was arrested by law enforcement. (App. 27). Petitioner's girlfriend identified him as the driver of the car. Petitioner's fingerprints

were recovered from inside the vehicle and from some of the stolen property found inside the vehicle. (App. 27-28). Petitioner's cellphone was also recovered from the vehicle (App. 28).

During its November 2017 term, the Greenville County Grand Jury indicted Petitioner for four counts of armed robbery and one count of attempted armed robbery. Larry Cooke, Esq. represented Petitioner and Assistant Solicitor Mark Moyer of the Thirteenth Circuit Solicitor's Office represented the State.

On March 4, 2019, Petitioner appeared in the Greenville County Court of General Sessions before the Honorable Robin Stilwell and pled guilty to four counts of armed robbery and one count of attempted armed robbery without a recommendation from the State. (App. 20-22). Judge Stilwell sentenced Petitioner to eighteen years' imprisonment on each count with all sentences to run concurrently with each other. (App. 34).

Petitioner filed a motion to reconsider his sentences on March 12, 2019. (App. 36). Petitioner's motion was denied on March 20, 2019. (App. 37-38). Petitioner did not appeal his sentences. On June 3, 2019, Petitioner filed an application for post-conviction relief alleging plea counsel did not advise him of his right to appeal his sentence. (2019-CP-23-3410). (App. 39-44). On January 29, 2020, the State filed a Return. (App. 48-52). Through counsel, Petitioner filed an amended application on March 10, 2020 that alleged plea counsel was ineffective for failing to review inculpatory photos with Petitioner as part of discovery prior to a previous plea offer expiring. (App. 46). A virtual evidentiary hearing into the matter convened on December 2, 2020 before the Honorable R. Lawton McIntosh, Circuit Court Judge. Petitioner was present with PCR counsel, Susannah C. Ross, Esquire. Assistant Attorney General Taylor Z. Smith represented the

State. Petitioner testified on his own behalf. The State presented testimony from plea counsel and the solicitor.

On March 3, 2021, Judge McIntosh issued a written order denying the application in full. (App. 108-27). On March 25, 2021, Petitioner appealed the denial of his application to this Court. On appeal, Petitioner only challenges the denial of relief for his claim that counsel was ineffective for failing to review inculpatory photographs with Petitioner prior to his plea offer expiring.

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. 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).

ARGUMENT

The post-conviction relief court properly denied relief for the allegation that plea counsel failed to review incriminating photos with Petitioner, because Petitioner failed to prove that plea counsel was deficient or that Petitioner would have insisted on going to trial if not for plea counsel's deficiency. Finally, Petitioner failed to prove that he was prejudiced by plea counsel's failure because the plea judge considered the State's original plea offer when sentencing Petitioner.

Petitioner claims the post-conviction relief court erred in denying him relief because plea counsel did not review inculpatory photographs with him prior to the expiration of the State's fifteen year plea offer. Because plea counsel failed to review the photographs with him, Petitioner argues the State's fifteen year plea offer was not effectively conveyed to him and he was unable to make an informed decision about whether to accept the plea. Petitioner's argument fails for three reasons. First, Petitioner failed to prove that plea counsel was deficient in failing to review the photographs taken from Petitioner's phone with Petitioner. Second, even if plea counsel was deficient in failing to review the photos with Petitioner, Petitioner failed to prove he would not have plead guilty and insisted on going to trial if not for plea counsel's errors. Finally, Petitioner was not prejudiced by plea counsel's alleged error because the plea judge took the solicitor's original fifteen year offer into consideration when sentencing Petitioner. This Court should deny certiorari.

Petitioner, like all other criminal defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel’s advice was not within the range of competence demanded of attorneys in criminal cases. Lockhart, 474 U.S. at 56. A defendant

needs to show (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted in going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

Here, Petitioner's argument fails for three reasons. First, Petitioner has failed to show plea counsel was deficient in his representation or that he failed to review the inculpatory photos with Petitioner. At the PCR hearing Petitioner testified that he saw the photos of himself wearing a red Adidas track suit while holding a firearm for the first time on the day of his trial. (App. 62). Petitioner claimed he would have accepted the Solicitor's original fifteen year plea offer if he had seen the pictures prior to that day. (App. 62). However, Petitioner's claims are contradicted by his own testimony and other testimony presented at the PCR hearing. Petitioner acknowledged that he knew these pictures existed and they were accessible from his Gmail account on his phone (App. 66). Plea counsel testified that while he didn't recall going over specific photos with Petitioner, Petitioner had all the evidence disclosed during discovery at his disposal. (App. 71, 75). Plea counsel was even able to identify the specific date, July 13, 2017, that he sent Petitioner his discovery. (App. 71). After discovery was sent to Petitioner, plea counsel recalled that Petitioner was unable to sleep the night after he reviewed the discovery. (App. 76-77). Therefore, Petitioner's claim that he would have accepted the State's fifteen year plea offer if he had known about the incriminating photographs is contradicted by the testimony presented at the PCR hearing. Accordingly, Petitioner failed to prove that plea counsel was deficient in failing to review the photographs with him.

Even if plea counsel was deficient in his representation of Petitioner, Petitioner has failed to show that if not for counsel's errors he would have insisted on going to trial rather than pleading guilty. In fact, Petitioner never insisted he would have gone to trial if not for counsel's errors. Rather, Petitioner claimed he would have plead guilty earlier if he had seen the pictures. (App. 62-63). Plea counsel corroborated Petitioner's testimony when he testified that Petitioner always wanted to plead guilty and was merely waiting for the most agreeable offer to be made. (App. 72, 77). The PCR judge referenced plea counsel's testimony in his ruling when he noted "I think that it's interesting what [plea counsel] said early in his testimony is that it was never ever a situation where [Petitioner] was not going to plead guilty. At all times he was going to plead guilty." (App. 103, lines 9-12). The PCR judge appropriately recognized that although Petitioner and plea counsel may not have reviewed the incriminating photos together, "it seems equally as clear to me that what [Petitioner] was hoping was to get an offer of under 15 years, closer to 12 years, as [plea counsel] testified to earlier and in the transcript. And when that backfired on him,[plea counsel] did the best he could to try to salvage the situation because there was going to be a plea at all times." (App. 103, lines 24-25- App. 104, lines 1-5). Thus, even if plea counsel were deficient in his representation, Petitioner always intended to plead guilty. Therefore, there was no probability Petitioner would have insisted on going to trial if not for plea counsel's deficient representation.

Finally, Petitioner failed to show he was prejudiced by plea counsel's alleged failures because the plea judge took the solicitor's original fifteen year offer into account when formulating Petitioner's eighteen year sentence. When sentencing Petitioner, Judge Stilwell correctly stated he was not required to accept the solicitor's recommendation even if the solicitor

was willing to make one. (App. 15). Judge Stilwell told Petitioner “so inasmuch as that was a recommendation to the Court, the Court could have elected to accept it or not accept it. And you’re in the same position now, that is, the same charges with the same maximum potential sentence.” (App. 15, lines 11-15). Furthermore, Judge Stilwell explicitly told Petitioner he would take the State’s original plea offer into consideration when sentencing Petitioner. (App. 16). The PCR judge recognized that Petitioner essentially got the benefit of a recommendation by the State when Judge Stilwell was made aware of the State’s previous recommendation. (App. 105). Therefore, the PCR judge correctly determined Petitioner suffered no prejudice from plea counsel’s alleged failure to review the incriminating photos with Petitioner. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined that Petitioner failed to show to plea counsel was deficient in his representation or that Petitioner would have insisted on going to trial if not for a deficiency, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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