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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable H. Steven DeBerry IV, Circuit Court Judge

SAM BUNCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001068

PETITION FOR WRIT OF CERTIORARI

VICTOR R SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel by failing to seek to reduce Petitioner's charges?

STATEMENT

During the August 2018 term the Spartanburg County Grand Jury indicted Petitioner for possession with intent to distribute (PWID) cocaine; possession with intent to distribute cocaine within one-half mile of a school; possession with intent to distribute cocaine base; possession with intent to distribute cocaine base within one-half mile of a school; possession with intent to distribute marijuana; possession with intent to distribute marijuana within one-half mile; resisting arrest. App. 86 – 106.

On August 29, 2018, Petitioner pled guilty before the Honorable Derham Cole. App. 1. James A. Cheek represented Petitioner. Id. Tatyana Stepanovna Ustimchuk represented the state. Id.

The state explained the sentencing recommendation for Petitioner's guilty plea was for Petitioner's possession with intent to distribute cocaine and cocaine base charges reduced from third offenses to second offenses. App. 3, ll. 17 – 22. Further the state recommended his sentences run concurrently. Id. Judge Cole accepted Petitioner's guilty plea. App. 15, ll. 8 – 9. Petitioner was sentenced to twenty years' imprisonment, suspended upon the service of ten years and probation for three years with the first ninety days being on home detention for PWID cocaine, second offense; five years' imprisonment for PWID cocaine within one-half mile of school; ten years' imprisonment for PWID cocaine base, second offense; ten years' imprisonment for PWID cocaine base within one-half of a mile of a school; five years' imprisonment for PWID marijuana; five years' imprisonment for PWID marijuana within one-half a mile of a school; and one year imprisonment for resisting arrest. App. 19, ll. 8 – 25. All of Petitioner's sentences ran concurrently. Id.

On April 16, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 22 – 31. The state filed its return on June 12, 2019. App. 32 – 38.

On August 3, 2021, Petitioner's PCR hearing proceeded before the Honorable Seven DeBerry, IV. App. 40. Rodney Richey represented Petitioner. Id. Chelsey Marto represented the state. Id.

In an order filed on September 14, 2021, the PCR court denied Petitioner relief. App. 72 – 85. The PCR court found that plea counsel did not provide ineffective assistance of counsel for failing to seek to reduce Petitioner's charges because Petitioner testified that he understood he pled to PWID charges because he thought he would get less time than proceeding to trial. Moreover, plea counsel testified that the evidence against Petitioner showed the state could get convictions for PWID because Petitioner had scales, cash, and different types of drugs. App. 83 – 84.

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel by failing to seek to reduce Petitioner's charges.

Relevant Facts

On June 30, 2018, on Pine Needle Drive in Spartanburg, Petitioner was stopped by Officer Lawrence Smith. App. 13, l. 9 – 14, l. 9. Lawrence "knew [Petitioner] to have a warrant for his arrest." Id.

Deputy Smith attempted to arrest Petitioner, but Petitioner allegedly failed to comply and attempted to flee. Id. Eventually Deputy Smith placed Petitioner in handcuffs and searched him. Id. Smith allegedly found "a green leafy substance" he believed to be marijuana "with a field weight of seven grams". Id. Along with the green leafy substance Smith allegedly found two digital scales, a purple Crown Royal bag containing "baggies with an off-white substance" and "multiple pills – bills consisting of various denominations." Id.

The substances found from the search were sent to Spartanburg County forensic analysis lab. Id. The alleged marijuana weighed a total of 5.95 grams; the baggies allegedly containing cocaine weighed .12 grams; and the baggie allegedly containing cocaine base weighed .30 grams. Id. The place of the arrest, 108 Pine Needle Drive, was allegedly .6 miles from 301 Crescent Road "the Early Learning Center." Id.

At Petitioner's guilty plea hearing, plea counsel requested that Petitioner get a minimum sentence. App. 15, l. 10 – 17, l. 22. "We'd ask the Court to consider the minimum sentence. If the Court determines that it's necessary that he be under any kind of incarceration, we ask the Court to consider the possibility of a home detention sentence because he would otherwise be able to conform his behavior in the community." App. 17, ll. 12 – 17. Plea counsel explained that the

drugs were for his personal use; however, plea counsel did not make an effort to have his charges reduced to simple possession. Had plea counsel tried to get Petitioner's charges reduced, Petitioner would have faced much less sentencing exposure. Moreover, plea counsel failed to move to dismiss the possession of cocaine, cocaine base, and marijuana with intent to distribute within one-half mile of a school, because, as the state, said *Petitioner was arrested .6 miles away from the school.* App. 14, ll. 8 – 9.

Instead, Petitioner's guilty pleas to possession of cocaine with intent to distribute, second offense; possession of cocaine base with intent to distribute, second offense; possession of marijuana with intent to distribute; possession of cocaine, cocaine base, and marijuana with intent to distribute within one-half mile of a school were allowed to proceed. The plea court accepted Petitioner's guilty plea. App. 15, ll. 8 – 9.

At Petitioner's PCR hearing he argued, inter alia, plea counsel provided ineffective assistance of counsel for failing to seek to reduce his charges. App. 45, l. 7 – 47, l. 20. Petitioner told plea counsel to try to reduce his charges as Petitioner was seeking to receive a lesser sentence of imprisonment. Id. Unfortunately for Petitioner, plea counsel "didn't even try" to do anything to get the charges reduced. Id.

Evincing plea counsel's ineffective assistance of counsel for failing to attempt to reduce Petitioner's charges was the fact that plea counsel let Petitioner plead guilty to three charges that were not supported by the facts alleged by the state. Specifically, plea counsel failed to move to dismiss, with dismissal being a reduction of Petitioner charges in the strongest terms, the possession with intent to distribute cocaine, cocaine base, and marijuana within one-half mile of a school charges, where *the state's own recitation of the facts alleged* that Petitioner was arrested ".6 miles" from a school. App. 14, ll. 8 – 9; App. 87, 97, 99. Therefore, Petitioner pled guilty to

charges that he could have wholly avoided had plea counsel provided effective assistance and attempted to reduce his charges.

Plea counsel testified at the PCR hearing that it was Petitioner's decision to plead guilty. App. 64, ll. 17 – 19. Plea counsel told Petitioner that due to the facts of the case it was unlikely that a jury would believe that Petitioner was just a drug user rather than a seller. App. 59, l. 1 – 60, l. 16. While plea counsel stated that he "would love for [Petitioner] to have a lesser sentence," he did not explain any actions he made to make that possible. App. 62, l. 9 – 63, l. 13. Furthermore, there was no mention at the guilty plea hearing of plea counsel's efforts to negotiate with the solicitor on reducing or dismissing any of Petitioner's charges.

While plea counsel wanted Petitioner to have lesser sentence it was incumbent upon plea counsel to take the steps necessary to effectuate that desire. The simplest step would have been to move to dismiss the three possession with intent to distribute within one-half mile of a school charges on the basis that *Petitioner was not arrested within one-half mile of a school.* App. 14, ll. 8 – 9.

That failure likely affected Petitioner's current sentencing because had those three charges been dismissed, the plea court may have sentenced him more leniently on the rest of his charges. Moreover, if Petitioner is charged with possession with intent to distribute within one-half mile of a school in the future, he now would face more serious sentencing exposure because of his more extensive prior record. Accordingly, plea counsel provided ineffective assistance of counsel that prejudiced Petitioner when he failed to seek to reduce Petitioner's charges.

Discussion

Due to plea counsel's ineffective assistance of counsel, Petitioner plead guilty to charges where the facts alleged by the state did not support a conviction. Since Petitioner was arrested

outside of one-half mile of a school, plea counsel could have had the three charges for possession with intent to distribute within one-half mile of a school dismissed, had he made an effort to reduce Petitioner's charges. App. 14, ll. 8 – 9; App. 45, ll. 12 – 14. That failure to have his charges reduced constituted deficient performance.

Petitioner was prejudiced by plea counsel's deficient performance because Petitioner was likely sentenced more severely because the unchallenged charges, that could have been dismissed, were included with the rest of his charges in his guilty plea. Moreover, if Petitioner faces future charges, the unchallenged charges from this case would improperly add to his prior record such that he likely be subjected to more severe sentencing on future charges.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove that counsel failed to render reasonably effective assistance under prevailing professional norms; and counsel's deficient performance prejudiced the applicant's case. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). In reviewing the PCR court's decision, this Court is concerned only with whether any evidence of probative value exists to support the decision. See Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). If no probative evidence exists to support the PCR court's findings, this Court will reverse. See Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

In Teamer v. State, 416 S.C. 171, 786 S.E.2d 109 (2016) this Court held that Teamer's counsel was not ineffective for failing to move to dismiss Teamer's charges. Teamer was convicted of first-degree burglary, felony driving under the influence (DUI) resulting in great bodily injury, and failure to stop for a blue light resulting in great bodily injury and sentenced to an aggregate term of thirty years in prison. Teamer, at 173, 786 S.E.2d at 110.

At post-conviction relief, Teamer argued, inter alia, that his trial counsel was ineffective for failing to move for dismissal of his DUI charge. Id. The PCR court granted relief and the state appealed. Id. On appeal the state argued that the PCR court erred in determining the motion to dismiss likely would have been successful because the PCR court misinterpreted S.C. Code Ann. § 56-5-2953, the incident site and breath test site video recording statute. Id., at 174, 786 S.E.2d at 110; See S.C. Code Ann. § 56-5-2953.

This Court held that the PCR court wrongfully determined Teamer's attorney would have been successful had he moved to dismiss the DUI charge because the "officer's failure to comply with the video-recording requirement mandated dismissal of the charge." Teamer, at 176 – 77, 786 S.E.2d at 111 – 12. The PCR court also erroneously concluded that Teamer was prejudiced because, "although subsection (B) of the statute excuses noncompliance with the recording requirement in certain situations, those exceptions require the arresting officer to submit a sworn affidavit," but no affidavit was submitted in this case. Teamer, at 177, 786 S.E.2d at 111 – 12. Thus, the PCR court found that the motion to dismiss would have been granted and trial counsel provided ineffective assistance of counsel that prejudiced Teamer. Id.

This Court explained the PCR court committed an error of law when it determined the statute required a sworn affidavit from the officer explaining why the video equipment was not on during the DUI stop for any of the exceptions to the video requirement to apply. Id., at 177, 786 S.E.2d. 112. This Court pointed out that an exception to the video requirement that did not require a sworn affidavit involved "circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests." Id. Since Teamer was arrested for failure to stop for a blue light in connection with a traffic accident, a sworn affidavit was not required for his charge to fall within that exception. Id. Accordingly, the PCR court erred when it held that Teamer's counsel would

have been successful had he moved to dismiss his DUI charge for failure of the officer to satisfy the video recording requirement. Teamer, at 178 – 79, 786 S.E.2d at 112 – 113.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), McKnight gave birth to a nearly full-term stillborn baby girl and an autopsy revealed the baby died from McKnight's cocaine use. McKnight, at 39, 661 S.E.2d at 356 – 57. McKnight was subsequently charged with homicide by child abuse pursuant to S.C. Code Ann. § 16–3–85 (2003). Id.

McKnight alleged her trial counsel was ineffective for failing to move to dismiss her charges "on the grounds that the disparity between the sentences for criminal abortion and homicide by child abuse violate[d] the Equal Protection Clause." McKnight, at 52, 661 S.E. at 363. This Court denied McKnight relief because "the PCR court correctly determined [she] ha[d] no equal protection claim" because she was not similarly situated to defendants charged under the criminal abortion statute. Id.

This Court explained that the sentencing differences between the homicide by child abuse statute and the criminal abortion statute reflected a valid legislative determination for the need to target a specific societal problem. Id., at 54, 661 S.E.2d at 54. Accordingly, the Court held the PCR court correctly determined that McKnight's counsel was not ineffective in failing to argue that the homicide by child abuse statute violated the Equal Protection Clause. Id., at 54, 661 S.E.2d at 364 – 65.

The failure to reduce or dismiss Petitioner's charges in this case is starkly contrasted against the alleged failure to move to dismiss in Teamer or McKnight. In Teamer and McKnight, the motions to dismiss would not have been successful. In both Teamer and McKnight, the purported failure to move to dismiss was not ineffective assistance because the facts supported the charges they were facing.

However, here the facts put forth by the state simply did not fit the elements of possession with intent to distribute within one-half mile of a school. During the plea colloquy, the state admitted Petitioner was arrested .6 miles from the "Early Education Center." App. 14, ll. 8 – 9. Thus, Petitioner's charges for possession with intent to distribute within one-half a mile of a school were not supported. Accordingly, unlike in Teamer and McKnight, had plea counsel made a motion to dismiss he would have been successful in reducing Petitioner's charges such that his failure to make the motion to dismiss constituted ineffective assistance of counsel that prejudiced Petitioner.

Other jurisdictions have encountered the issue of whether a plea counsel provided ineffective assistance of counsel for failing to reduce by moving to dismiss a defendant's charges as well. Regarding the failure to move to dismiss charges, in United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994) the Ninth Circuit held Palomba's counsel provided ineffective assistance of counsel when he failed to move to dismiss two charges of mail fraud. Palomba, at 1463 – 64.

On April 10, 1990, Palomba was charged with making false statements to a federal agency, mail fraud, and conspiracy. Palomba, at 1459. Palomba, through a corporation, submitted affidavits containing false statements of financial worth to federal agencies in order to obtain approval to act as a surety on government construction contracts. Id. The mail fraud charges were not brought in the original indictment but were added three months later in a superseding indictment. Palomba, at 1462 – 63. On appeal, Palomba contended that because the mail fraud counts were indicted after the deadline set forth in the Speedy Trial Act his trial counsel should have moved to dismiss them. Palomba, at 1463; See 18 U.S.C. § 3162.

Regarding deficient performance, the Ninth Circuit determined that trial counsel's performance was deficient pursuant to Strickland because "no apparent or plausible tactical

decision could explain counsel's failure to move for dismissal." Id., at 1466. However, the government in Palomba argued that even if trial counsel was successful in dismissing Palomba's mail fraud charges, his sentence would not have been reduced and, therefore, Palomba was not prejudiced. Id., at 1464 – 65.

The Ninth Circuit recognized that Palomba's sentence may not have been reduced in the absence of the mail fraud charges but refused to agree that their dismissal would not have been a benefit to him. Id. Prejudice from the ineffective assistance of counsel was established because "[a]n erroneous conviction may be prejudicial even if the error did not immediately lead to additional jail time" where there was the possibility for the unchallenged conviction to affect the defendant's sentencing on potential future convictions. Id., at 1465.

The Iowa Supreme Court has ruled on this issue in State v. Allen, 708 N.W.2d 361 (Iowa 2006). The Iowa Supreme Court held that Allen's counsel provided ineffective assistance of counsel when he failed to challenge Allen's guilty plea for lacking a factual basis. Allen, at 363 – 64.

Allen appealed her conviction for introducing a controlled substance into a detention facility. Id., at 364. Allen argued that her trial counsel was ineffective in permitting her to plead guilty to the charge of introducing a controlled substance into a detention facility because under the Iowa statute the building she brought the controlled substance into was not a "detention facility." Allen, at 364; See Iowa Code Ann. § 719.8.

The Iowa Supreme Court held defense counsel "fails to perform an essential duty when counsel allows the defendant to plead guilty to a charge for which there is no factual basis and thereafter does not file a motion in arrest of judgment challenging the plea." Allen, at 365. The

Iowa Supreme Court agreed with Allen's interpretation of the statute that the facility in question was not a "detention facility." Allen, at 366 – 368.

Regarding the question of prejudice, the Iowa Supreme Court's was emphatic, the failure to attack a plea that lacked a factual basis "*results in prejudice per se*." Id. at 368 (emphasis added). "To hold otherwise, 'would erode the integrity of all pleas and the public confidence in our criminal justice system.'" Id.; quoting State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996); See State v. Myers, 653 N.W.2d 574, 579 (Iowa 2002) ("Establishing ineffective assistance of counsel on the basis a guilty plea lacks a factual basis does not require a separate showing of prejudice"). Accordingly, the Iowa Supreme Court vacated Allen's charge for introducing a controlled substance into a detention facility and remanded the case to the district court. Allen, at 369.

This case is closer to Allen and Palomba than it is to Teamer and McKnight. Both Petitioner's unchallenged charges for possession with intent to distribute within one-half a mile of a school in this case and Allen's charge for introducing a controlled substance into a detention facility were not supported by the underlying facts. App. 14, ll. 8 – 9; Allen, at 366 – 68. Moreover, similarly to Palomba, "no apparent or plausible tactical decision could explain counsel's failure to move for dismissal" in this case. See Palomba, at 1466. Accordingly, plea counsel in this case provided deficient performance when he failed to try to reduce Petitioner's charges by moving to dismiss Petitioner's possession with intent to distribute within one-half a mile of a school charges because the motion to dismiss would have been successful.

While in Allen, the Iowa Supreme Court held that prejudice was presumed because "[t]o hold otherwise, 'would erode the integrity of all pleas and the public confidence in our criminal justice system,'" Petitioner can show he suffered actual prejudice as well. Allen, at 368. First, there was a reasonable likelihood that Petitioner's current sentencing was negatively affected by the

inclusion of the possession with intent to distribute within one-half a mile of a school charges such that he was prejudiced by plea counsel's failure to move to dismiss them.

Additionally, prejudice results from the failure to move to dismiss erroneous charges where there was the possibility for the unchallenged convictions to affect the defendant's sentencing on potential future convictions. See Palomba, at 1465; see also State v. Tucker, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996) (holding that a defendant's prior record is a relevant consideration for sentencing purposes). Accordingly, Petitioner was also prejudiced in this regard because the unchallenged charges in this case would certainly create the possibility to negatively affect Petitioner's sentencing on potential future charges. See Strickland, supra.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to allow for further briefing on this issue.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2022.