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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Darlington County
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Trial Judge
The Honorable Michael G. Nettles, PCR Judge

Appellate Case No. 2021-001155

CEPHAS COWICK.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

- I. Whether the PCR Court erred in dismissing Petitioner's PCR application upon the finding that the ineffective assistance of counsel claims raised therein fall under the scope of the plea agreement waiver.

- II. Whether the PCR Court erred in dismissing Petitioner's PCR application upon the finding Petitioner did not receive constitutionally defective advice concerning the plea agreement or waiver when the PCR Court failed to apply the proper standard and the record fails to establish a knowing and voluntary waiver.

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly dismiss the action based upon Petitioner's valid waiver of post-conviction relief actions pursuant to *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015)?

STATEMENT OF THE CASE

Cephas Cowick (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. During its October 2016 term, the Darlington County Grand Jury indicted Petitioner for two counts of murder (2016-GS-16-01433 and -01434), criminal conspiracy (2016-GS-16-01435), armed robbery (2016-GS-16-01436), first degree burglary (2016-GS-16-01437), grand larceny (2016-GS-16-01438), and possession of a weapon during the commission of a violent crime (2016-GS-16-01439), and third-degree arson (2016-GS-16-01440). Petitioner was represented by Emily Kuchar and William McGuire, Esquires (hereafter “Counsel”). Deputy Solicitor Kernard Redmond, Esquire, from the Fourth Circuit Solicitor’s Office, represented the State. On June 24, 2020, Petitioner pled guilty as indicted before the Honorable Eugene C. Griffith, Jr., circuit court judge. The plea took place through the virtual WebEx platform. In accordance with the negotiations with the State, Judge Griffith sentenced Petitioner to life without possibility of parole for the murder charges, thirty years’ imprisonment for armed robbery and first-degree burglary, fifteen years’ imprisonment for third-degree arson, ten years’ imprisonment for criminal conspiracy, and five years’ imprisonment for grand larceny. The weapons possession charge was dismissed because Petitioner was sentenced to life. As a part of the plea negotiations, Petitioner agreed to waive all appeals and PCR actions regarding issues known to him at the time of the PCR hearing. Petitioner did not appeal his plea or sentence.

Petitioner timely filed a PCR application on March 11, 2021. Respondent filed a return and partial motion to dismiss on July 11, 2021, amended July 29, 2021, requesting a hearing pursuant to *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015). The hearing on the State’s motion to dismiss occurred on August 24, 2021, before the Honorable Michael G. Nettles,

virtually via WebEx. William G. Yarborough, III, and Lauren C. Hobbis, Esquires represented Petitioner. William H. Ray, Esquire of the South Carolina Attorney General's Office represented Respondent.

The Court issued an order of dismissal, dismissing the application based upon Petitioner's valid waiver of the right to seek collateral actions involving issues known to him at the time of the plea and remanding him to the custody of South Carolina Department of Corrections, filed on October 7, 2021. Petitioner appeals from the denial of relief based upon the allegations that the Court erred in finding that ineffective assistance of counsel claims were encompassed in the plea agreement waiver and that Petitioner received constitutionally defective advice concerning the plea agreement and waiver.

STATEMENT OF FACTS

On July 17, 2016, at approximately 6:20 in the morning, Petitioner and his wife, Katherine Cowick, were captured on surveillance footage outside a convenient store in a Geo Tracker. (Amended App. 110-11). The Geo Tracker, driven by Katherine, was picked up on the store's surveillance footage shortly after the initial sighting. (Amended App. 115). The Geo Tracker left the store once more, before returning around 7:40 A.M. alongside a black Cadillac Escalade driven by Petitioner. (Amended App. 115). During the approximate hour and a half between the first and final sightings, Petitioner was dropped off at Ms. Couplin's residence where he proceeded to shoot and kill Ms. Couplin and her nine-year-old granddaughter, De'Ziyah Chatman-Davis. (Amended App. 113). Petitioner took pills, money, and a debit card from the home, before stealing her Escalade and returning to the convenient store with his wife. (Amended App. 113-14).

Around 11:50 that morning, Denise Couplin's son awoke in the upstairs bedroom, walked downstairs, and found De'Ziyah's body. (Amended App. 111). Byron then took his six-year-old niece to the neighbor's house to call 911 and other family members. (Amended App. 111). When law enforcement arrived, they found Ms. Couplin's body near De'Ziyah's body. (Amended App. 111). Law enforcement was immediately made aware of Petitioner's possible involvement through information provided by family members about harassing calls he made. (Amended App. 111-12). Law enforcement found Ms. Couplin's Escalade burned and abandoned, a short distance from the crime scene. (Amended App. 112).

That same day, Petitioner was picked up by law enforcement and interviewed, where he initially denied the charges. (Amended App. 112). However, Petitioner ultimately admitted to

being dropped off at Ms. Couplin's home, going into the residence, shooting Ms. Couplin and De'Ziyah twice, then leaving in Ms. Couplin's Escalade. (Amended App. 113).

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 PCR 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), SCRCPP; *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. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding 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

On appeal, Petitioner argues the PCR court erred in denying him relief because he did not waive ineffective assistance of counsel claims as a part of the plea negotiations. However, the PCR court properly rejected this argument, finding that Petitioner validly waived all collateral attacks involving claims known to him at the time of the plea, including ineffective assistance of counsel claims. Further, the PCR court properly found Petitioner waived these rights with effective assistance of counsel. 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.

Petitioner, like all other 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); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). 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 petitioner 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 guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” *Garren v. State*, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see *Jamison v. State*, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

Under South Carolina law, a defendant can choose to waive his right to collateral review of his conviction so long as the waiver is knowingly and voluntarily made. *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary). Plea agreements in general operate under

contractual principles and are upheld when each party receives the benefit of the bargain. *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994).

While appellate and collateral waivers are enforceable, a defendant who has waived his appellate and collateral review is still entitled to proceed forward with a post-conviction relief action on the very narrow issue of challenging his attorney's conduct in advising him to enter the waiver. *Sanders*, 412 S.C. at 617, 773 S.E.2d at 583 ("Consequently, we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective.").

In the present case, Petitioner chose to waive his post-conviction relief rights in exchange for an advantageous plea offer that took the death penalty off the table. Both parties received a benefit of the bargain, and this agreement is valid under contractual law.

At the plea hearing, Petitioner explicitly waived all appeals and PCRs at the plea hearing itself. (Amended App. 99). Prosecutor made clear that Petitioner "would waive not just appeals, but any collateral attacks as well." (Amended App. 124-25). The plea court turned to Counsel:

[W]hat Solicitor Redmond also was asking was, you're agreeing by virtue of this negotiation to waive any rights to appeal. He also was suggesting to waive any collateral attacks and I'm understanding that must be post-conviction relief challenges. Counsel for Mr. Cowick, is that correct, is that correct, is that your understanding of what he's waiving also?

(Amended App. 125).

Counsel Kuchar's response was "[w]e believe that we're able to waive post-conviction relief as to any issues that are now known to Mr. Cowick." (Amended App. 125). After this discussion, Petitioner stated he understood what he was waiving and proceeded to waive all collateral attacks pertaining to anything known to him as of the date of the plea hearing.

(Amended App. 125-26). Though Counsels Scales and McGuire stated that they could not *advise*

Petitioner to waive all claims of ineffective assistance of Counsel, Petitioner still advised the court that he was satisfied with counsels, that he understood their advice, and believed they provided him with good and fair advice. (Amended App. 127-28).

Petitioner stated that he had previously been treated for mental health disorders, but counsels confirmed that they had no concerns about Petitioner's competency. (Amended App. 122). Petitioner confirmed he did not take any prescribed or unprescribed medication, drugs or alcohol within twenty-four hours of the plea, that he felt clear-headed and good that day, and that he had enough to eat. (Amended App. 122-23).

At the PCR hearing, Prosecutor stated that the plea process was initiated by Petitioner's counsels, who sent a letter stating that, under proposed negotiations, Petitioner would waive his right to appeal and the ability to pursue all PCR and habeas actions. (Amended App. 29). A follow up letter was sent, stating that Petitioner would waive all appeals and collateral actions in entering his plea. (Amended App. 30). Prosecutor testified that it was his understanding that if Petitioner pursued a PCR action, the plea agreement would be void and Prosecutor would be permitted to move to reopen the sentencing process. (Amended App. 32). Prosecutor testified that his understanding was that the waiver encompassed ineffective assistance of counsel claims, as far as the claims related to information that existed at the time of the plea. (Amended App. 33). Counsel McGuire testified that he believed the waiver's scope was fully laid out in the initial letter Prosecutor referred to. (Amended App. 28). Petitioner confirmed that as a part of his plea agreement he waived his right to pursue post-conviction relief. (Amended App. 53).

The waiver can be readily gleaned from the record established. Specifically, Petitioner presented to the plea court that he intended to waive his right to pursue collateral actions and confirmed this at the PCR hearing. This decision was objectively reasonable, given that it

permitted him to escape receiving the death penalty. *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (internal quotation marks omitted) (finding that a petitioner's subjective finding or assertion is non-dispositive and to establish prejudice the petitioner must establish that going to trial would have been objectively reasonable, given the circumstances). Petitioner waived this right with the advice of competent counsel. This was not induced by any purported mis-advice by counsel or any lack of knowledge as to what post-conviction relief was and the implications of the waiver, but by his own desire to secure a favorable plea offer that allowed him to escape the death penalty. Further, there was no indication Petitioner's history of mental health issues had any impact on his ability to understand the waiver. (Amended App. 122-23).

Petitioner's argument to the contrary fatally hinges on one major flaw in the analysis: namely, that Petitioner was entirely unable to enter this plea negotiation that counsels were not able to specifically advise him concerning every condition. Specifically, Petitioner presupposes that because counsels could not explicitly advise him to waive all claims of ineffective assistance of counsel, those claims could not have been waived independently by Petitioner. Respondent asserts that this runs contrary to the negotiations themselves, as articulated in both the letters laying out the negotiations, as well as the plea hearing transcript as well. At the plea hearing, only one exception to the blanket ban on collateral actions was laid out: Petitioner was permitted to raise collateral attacks regarding issues unknown to him at the time of the plea. All claims raised in the application were known to Petitioner at the time of the plea and, thus, were waived. Ineffective assistance of counsel claims were not raised as a second exception and should not be treated as such. Accordingly, Respondent contends no prejudice is established because of the waiver. Petitioner waived his right to assert ineffective assistance of counsel allegations and should not be permitted to raise these claims now.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner waived his right to pursue collateral actions, including claims of ineffective assistance of counsel in post-conviction relief actions. 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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