

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Heath P. Taylor, Circuit Court Judge

Case No.: 2020-CP-38-00276

Lance Miller #250647,..... Petitioner,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Lance Miller #250647 appeals the order of the Honorable Heath P. Taylor dated and filed February 16, 2023. Appellant received written notice of entry of this order on February 21, 2023.



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Irmo, South Carolina
February 24, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
LANCE MILLER, #250647)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2020-CP-38-00276

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIFRA B. CLARK
CLERK OF COURT
ORANGEBURG, SC
FEB 17 AM 9:14
(5)

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Lance Miller on February 21, 2020. On January 24, 2023, an evidentiary hearing convened before the undersigned. Applicant was present and represented by Tommy Thomas, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the plea transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a seventeen-year sentence. In November 2018, the Orangeburg County Grand Jury indicted Applicant for murder (2018-GS-38-1768), attempted murder (2017-GS-38-761), and attempted armed robbery (2017-GS-38-760). The attempted murder and attempted armed robbery charges arose from an incident involving Erik Jameson; Jameson alleged Applicant fired a gun at him during a drug deal. The murder charge arose from the fatal shooting of Scott Brooks in Brooks's home. Both incidents occurred on March 20, 2017.

ATTEST: TRUE COPY
Winnifra B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

On October 28, 2019, Applicant pled guilty to attempted armed robbery and voluntary manslaughter¹ before the Honorable Edgar W. Dickson. Ray Chandler and Blair Jennings, Esquires, represented Applicant. Solicitors David Pascoe and Catherine Mubarak represented the State. Judge Dickson sentenced Applicant concurrently to seventeen years' imprisonment for each charge. Applicant did not file a direct appeal.

Current Application

Applicant timely commenced this PCR application on February 21, 2020. In his application Applicant alleged he was entitled to relief based on the following grounds:

1. Ineffective assistance of counsel
 - a. Counsel's advice to plea Alford was incompetent
 - b. Involuntary Alford plea
2. Court lacked jurisdiction for voluntary manslaughter plea.

Prior to the evidentiary hearing, Applicant amended his application to allege the following:

1. Involuntary guilty plea: the Alford plea was not freely, voluntarily, knowingly, or intelligently given.
2. Ineffective assistance of counsel: Counsel's ineffectiveness in the following manners led to Applicant's involuntary plea:
 - a. Counsel failed to adequately investigate and prepare for trial.
 - b. Applicant provided a proffer to law enforcement that allowed them to solve the case.
 - c. Applicant initially was going to testify against a co-defendant, but after a change in prosecutors, the case shifted to Applicant being the culprit and the co-defendant was going to testify against Applicant.
 - d. Counsel failed to present inconsistencies and factual problems with the co-defendant's statements.
 - e. The photo identification was suggestive, and counsel was ineffective in properly presenting this issue to the Court.
 - f. Applicant was improperly advised to give the proffer which resulted in his arrest.

¹ Applicant pled to voluntary manslaughter as the lesser-included offense of murder pursuant to North Carolina v. Alford, 400 US 25 (1970).

At the hearing, Applicant proceeded only on the claims raised in his amended application. Before this Court are the Orangeburg County Clerk of Court records of the underlying convictions, the plea transcript, the records from this PCR matter, and Applicant's records from the South Carolina Department of Corrections.

Testimony Presented at the Evidentiary Hearing

At the evidentiary hearing, Applicant testified he was initially charged with attempted murder and attempted armed robbery, and he retained Ray Chandler after he was released on bond. Blair Jennings, who worked with Chandler, took over his representation. Applicant stated he met with counsel six to seven times, discussed "what happened," and reviewed some discovery. He testified Brooks—the murder victim—had been his friend, and the investigation into that case had stalled. Applicant stated Jennings suggested he proffer a statement to police to aid in that investigation. In the statement, Applicant indicated he was present when Brooks was fatally shot and Aaron Beach was the shooter. Applicant testified plea counsel promised him he would not be charged with murder if he provided the proffer. He stated after his proffer, Beach was charged with murder. Thereafter, Beach implicated Applicant as the shooter, and Applicant was charged with murder. Applicant stated the original solicitor on the case was fired after the proffer and Pascoe took over the prosecution.

Applicant expressed concern with Jameson's identification of him, explaining he told counsel there was "no way this man picked [him] out of a lineup." Applicant stated a police officer showed Jameson a picture of Applicant from social media prior to presenting Jameson with a lineup, and Jameson identified Applicant from the social media picture as the person who shot at him.

Applicant testified he "knew from past" experiences about an Alford plea, and he raised

that to the plea court during his plea hearing. Although Applicant initially testified his plea was freely and voluntarily given, he later stated it was *not* freely and voluntarily given. Applicant asserted he never should have pled and complained that he received a seventeen-year-sentence while his co-defendant received five years of probation. Applicant maintained he had no reason to kill his friend and asserted counsel should have used inconsistencies in Beach's statements.

Chandler testified he was retained after Applicant was arrested for attempted armed robbery and attempted murder but before Applicant was arrested for murder. Chandler was with Applicant when Applicant provided the proffer; Chandler explained Jennings had previously worked with the solicitor's office and they were trying to "get ahead of the game." Chandler stated Applicant was not promised anything for the proffer, averring a promise would have been improper. Chandler testified Applicant had a significant prior record, and a trial could have been "a trainwreck." He clarified it would have been difficult for Applicant to testify at trial due to his prior record. Chandler did not recall telling Applicant he would not be charged with murder if he provided the proffer. He agreed the initial solicitor on Applicant's case was dismissed from the solicitor's office but could not recall the circumstances. Chandler asserted the photo lineup was not good—a point they raised pretrial during a Neil v. Biggers hearing. Chandler believed Jennings did a good job cross-examining the State's witness during the Biggers hearing, which ultimately led to the State making a plea offer.

Jennings testified he met with Applicant several times, reviewed the State's evidence, explained the strength and weaknesses of the State's case, and explained what the State would have to prove. Jennings stated he also explained to Applicant the constitutional rights Applicant would waive by pleading guilty and the sentence he potentially faced—both at the plea and if convicted at trial. Jennings never had any concerns with whether Applicant understood his

conversations. He averred Jameson's identification of Applicant was unduly suggestive—something he planned to challenge at trial. Regarding the proffer, Jennings stated that under the terms of the proffer, it could not be used against Applicant in a trial. He testified the proffer was a worthwhile strategy at the time. Jennings testified he never relayed to Applicant that Applicant would not be charged with murder if he provided the proffer.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Involuntary Plea

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "To be knowing and voluntary, a plea must be entered with an awareness of its consequences." Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996). "To find a guilty plea is voluntarily and knowingly entered into, the record must 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).

This Court finds Applicant failed to show his plea was involuntary. This Court finds **credible** Jennings' testimony that he explained to Applicant prior the plea the constitutional rights Applicant was waiving and the sentence he faced—both if convicted at trial and under the plea. This Court further finds **credible** Jennings' testimony that Jennings had no reason to doubt

Applicant understood their conversations. Finally, the plea transcript itself supports a finding that Applicant was fully aware of the consequences of his plea, and thus pled guilty knowingly, voluntarily, freely, and intelligently. Specifically, the plea court asked applicant whether plea counsel had explained his constitutional rights, including his right to a jury trial, and Applicant indicated counsel had explained those rights, counsel had answered his questions, and Applicant understood those conversations. (Tr. 86-87). Applicant also told the plea court he understood that under the plea terms, he faced a sentence of two to twenty years. (Tr. 89). Finally, Applicant informed the plea court no one had threatened or forced him to plead guilty. C.f. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (“[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.”). Based on the foregoing, this Court finds Applicant understood the consequences of pleading guilty at the time he entered his plea, and Applicant has failed to prove his plea was involuntary.

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d

at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687-88; Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." Dalton v. State, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). To prove prejudice following a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Failure to Investigate / Prepare for Trial

This Court finds Applicant failed to prove counsel was ineffective for failing to investigate and prepare for trial. At the PCR hearing, Applicant never testified specifically to *what* counsel allegedly failed to investigate or what more counsel should have done to prepare for trial; rather, his testimony focused primarily on the proffer. This Court finds **credible** counsel's testimony that they reviewed discovery with Applicant prior to trial. Further, this Court finds counsel *did* prepare for trial by reviewing discovery and filing a pretrial motion to challenge Jameson's identification.² (Tr. 47-83). Finally, Applicant did not produce any evidence at the PCR hearing of what a further investigation would have uncovered and thus failed to prove prejudice in this regard. Cf. Glover

² Although Applicant pled guilty before the conclusion of the pretrial Neil v. Biggers hearing, this Court finds counsel did an effective job of cross-examining the State's witness during the pretrial hearing and setting up an argument to attempt to suppress Jameson's identification.

v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must produce witnesses at a PCR hearing to support a claim that counsel was ineffective for failing to interview or call potential witnesses). Thus, Applicant has failed to show counsel was ineffective in either investigating or preparing for trial.

Proffer

Applicant contends counsel was ineffective for advising him to provide a proffer to law enforcement that allowed law enforcement to solve Brooks's murder and led to Applicant's arrest. This Court finds Applicant failed to prove counsel was ineffective in this regard.

At the PCR hearing, Applicant testified law enforcement was having trouble determining who murdered Brooks. He stated Brooks had been his good friend, and Applicant did not want the killer to go free. Applicant stated counsel suggested he talk to police.³

Counsel testified Applicant was initially arrested for attempted armed robbery and attempted murder stemming from an incident involving Jameson; at the time of the proffer, the investigation into Brook's murder had stalled. Chandler explained they were "trying to get ahead of the game" in providing the proffer. Jennings stated that under the proffer agreement, the State would not be able to use the statement against Applicant at trial. Finally, both Chandler and Jennings testified they did *not* promise Applicant he would not be charged with murder if he provided the proffer. Jennings testified it was Beach's statement rather than the proffer that led police to charge Applicant with murder.

This Court finds counsel's testimony in this regard was **credible**. Further, this Court finds counsel articulated a reasonable strategy in using the proffer to try to garner favor with the

³ Applicant's proffer is in the plea transcript. In it, Applicant admitted being present during the attempted armed robbery/attempted murder and the murder, but he claimed Beach had the gun. Applicant further claimed he did not know Beach would murder Brooks or attempt to rob Jameson.

prosecution. This Court further finds it was ultimately Applicant's decision to make the proffer, and based on Applicant's PCR testimony, he provided the proffer because Brooks was his friend and he wanted to help investigators solve that case. There is no evidence showing Applicant had previously told plea counsel something *other* than what he ultimately told investigators. In fact, Applicant's testimony at the PCR hearing was consistent with his proffer to law enforcement. Based on what counsel knew at the time of the proffer, their advice to proffer in an attempt to garner favor with the prosecution was reasonable under prevailing professional norms and thus not deficient. See Strickland, 466 U.S. at 689 (1984) ("[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (internal citation omitted)).

Further, Applicant has not shown prejudice. Specifically, he has not shown a reasonable probability that but for the proffer, he would not have pled guilty but would have insisted on going to trial. Prior to the murder charge, Applicant faced charges for attempted armed robbery and attempted murder; if convicted of both charges, he faced a sentence of up to fifty years' imprisonment. Because the State could not use the statement against him at trial, his proffer did not make it more likely he would be convicted of those charges. Ultimately, Applicant pled guilty to attempted armed robbery in addition to the murder charge, and this Court finds Applicant did not meet his burden of proving he would have proceeded to trial rather than plead guilty if he had not provided the proffer. Thus, this allegation is denied and dismissed with prejudice.

Co-defendant testimony

In his amended application, Applicant raised two issues related to Beach, his co-defendant: (1) Applicant initially was going to testify against Beach, but after a change in prosecutors, the case shifted Applicant being the culprit and Beach was going to testify against Applicant; and (2) counsel failed to present inconsistencies and factual problems with Beach's statements. This Court finds Applicant has failed to prove counsel was ineffective. First, plea counsel had no control over who was assigned to prosecute the case, the State's strategy, or the order in which the cases were called. Applicant has not shown counsel's representation in this regard fell below prevailing professional norms; thus, Applicant has not shown deficiency. Second, Applicant pled guilty prior to trial—precluding counsel from using any allegedly inconsistent statements to impeach Beach. This Court notes Jennings cross-examined the State's witness during the pretrial hearing about inconsistencies in Beach's statements and finds it is reasonably likely counsel would have likewise cross-examined Beach about any inconsistent statements he may have made had this case proceeded to trial and Beach testified against Applicant. Ultimately it was Applicant's decision to plead guilty—which Applicant made freely, voluntarily, intelligently, and knowingly—that precluded counsel from cross-examining Beach about inconsistent statements; thus, Applicant has not shown counsel was ineffective in this regard.

Photo identification

Applicant contends counsel was ineffective for failing to challenge Jameson's identification of him from a photographic lineup, which he avers was procured by an unduly suggestive procedure. This Court finds Applicant has not shown counsel was ineffective in this regard. Critically, counsel filed a pretrial motion challenging the suggestiveness of the identification. (Tr. 4). Counsel cross-examined the State's witness extensively during a pretrial

Neif v. Biggers hearing; ultimately, however, Applicant chose to plead guilty in the middle of that hearing. At the PCR hearing, counsel testified the trial judge had relayed to them in chambers that he would likely allow the photographic lineup into evidence. Jennings further testified he would have continued to challenge the identification if Applicant had proceeded to trial. This Court finds the foregoing testimony by counsel **credible**. Because counsel filed a motion to challenge the identification and was in the process of challenging it when Applicant pled guilty, Applicant has not shown deficiency. Further, Applicant has not shown a reasonable probability that he would have proceeded to trial if counsel had challenged the identification (which counsel was in the process of doing), and thus did not prove prejudice. Ultimately Applicant pled guilty; in doing so, he waived his right to challenge this identification. Because it was Applicant's decision to plead guilty—which he did knowingly, freely, intelligently, and voluntarily—this Court finds Applicant failed to prove counsel was ineffective for not further challenging the identification.

Conclusion

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule 71.1(g), SCRPC, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 16th day of February, 2023.



HEATH P. TAYLOR
Presiding Judge
First Judicial Circuit

Orangeburg, South Carolina