RECEIVED
Mar 10 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Richland County
Honorable Jocelyn Newman, Circuit Court Judge
Appellate Case No. 2019-002075

SHIQUAN TYON CWIKLINSKI,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Other State and Federal Cases:

Statutory Provisions:

Other Authorities:

STATEMENT OF ISSUE ON CERTIORARI

"Did the PCR judge err in refusing to find counsel ineffective for failing to move for a motion to reconsider sentence?"

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge err by determining Cwiklinski failed to meet his burden of establishing defense counsel was constitutionally ineffective for not filing a motion to reconsider the sentence imposed when: (1) defense counsel was not asked to file such a motion and did not have any legitimate grounds upon which to make one that had not already been presented to and considered by the plea judge; and (2) there was no reasonable likelihood the result of the proceedings would have been different but for defense counsel's supposedly deficient performance since the plea judge was aware of and had already considered all the pertinent sentencing information prior to choosing to impose a twenty-year sentence in Cwiklinski's case?

STATEMENT OF THE CASE

In February of 2013, Petitioner Shiquan Tyon Cwiklinski was arrested following an investigation into a shooting that occurred in the Five Points area of Columbia, South Carolina. In July of 2013, the Richland County Grand Jury indicted Cwiklinski for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. On October 15, 2015, Cwiklinski appeared in the Richland County Court of General Sessions and—based on negotiations with the State—entered a guilty plea to two count of the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN") along with one count of possession of a weapon during the commission of a violent crime before the Honorable Tanya A. Gee, circuit court judge.[1] Cwiklinski's guilty plea was accepted, and the plea judge sentenced him to an aggregate twenty-year term of imprisonment for his convictions. Cwiklinski—through defense counsel—then timely initiated an appeal.

On appeal, the Court of Appeals issued an order dismissing the matter due to Cwiklinski's failure to provide a sufficient explanation for the appeal pursuant to Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules.[2] Thereafter, on April 20, 2016, remittitur was issued.

Subsequent to the issuance of the remittitur, Cwiklinski timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary

---

[1] As part of the plea negotiations, the solicitor agreed to dismiss Cwiklinski's pending indictments for one count of second-degree burglary, one count of petit larceny, and two counts of attempted murder, which arose from two separate incidents that occurred in September of 2011 and February of 2012. (App'x p. 13).

[2] The records associated with Cwiklinski's appeal following his guilty plea hearing are currently available through the South Carolina Appellate Court Public Index. Appellate Records for State v. Shiquan Tyon Cwiklinski, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=60646.

hearing. On December 3, 2018, an evidentiary hearing was conducted in the Richland County Court of Common Pleas with the Honorable Jocelyn Newman, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge orally declined to grant relief and indicated an order would follow. Thereafter, the PCR judge issued an order denying and dismissing Cwiklinski's PCR application. Following that, Cwiklinski timely submitted a motion asking the PCR judge to alter or amend her judgment, and the PCR judge denied that motion. Cwiklinski then timely filed a notice of appeal.

After initiating his appeal, Cwiklinski filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to this Court. Subsequently, on October 24, 2022, this Court granted Cwiklinski's petition.

STATEMENT OF THE FACTS

Summary of Cwiklinski's Crimes and Subsequent Entry of a Guilty Plea

Around 2:00 a.m. on February 23, 2023, Investigator Emmitt Gilliam of the Columbia Police Department was on patrol in Columbia's Five Points area when he observed a large group rapidly run out of a notorious establishment called the Library. (App'x pp. 7-8). Concerned, Investigator Gilliam attempted to stop the group in order to find out what was going on, and one of the group's members—Kendale Pollock—responded by cussing repeatedly and loudly at the officer. (App'x p. 8). Despite his best efforts, Investigator Gilliam was unable to calm Pollock down, so he decided to arrest Pollock for disorderly conduct due to his inappropriate behavior. (App'x p. 8).

While the officer was dealing with Pollock, Cwiklinski—who was on bond *and* probation at that time—scurried back to his nearby car. (App'x p. 8; pp. 16-17). Upon doing so, Cwiklinski promptly retrieved a gun from the vehicle, walked back towards Investigator Gilliam and Pollock, aimed his pistol in their direction, and fired a volley of approximately seven shots at them. (App'x p. 8; pp. 15-16). His bullets whistled over Investigator Gilliam's head, and the officer responded by taking cover while simultaneously attempting to protect Pollock from the fusillade. (App'x p. 9; pp. 11-12).

Bizarrely, Cwiklinski followed up the shooting by discarding his gun, nonchalantly approaching Investigator Gilliam, and asking for the release of his "homeboy." (App'x pp. 8-9). However, due to the chaotic events that had just unfolded, Investigator Gilliam was unaware at the time Cwiklinski was the shooter, so the officer allowed Cwiklinski to leave the area after simply obtaining his identification information. (App'x p. 9).

Subsequent to that, an investigation into the shooting was rapidly initiated, and, through it, law enforcement identified the shooter's vehicle, which was determined to be registered to Cwiklinski's mother. (App'x p. 9). Beyond that, officers obtained surveillance footage of the shooting, and that footage depicted Cwiklinski repeatedly firing a gun directly towards Investigator Gilliam and Pollock in the crowded area where the incident unfolded. (App'x pp. 9-10; pp. 12-13; pp. 15-16).

On the following day, Cwiklinski was arrested, and, at the time of his arrest, he was still wearing some of the clothing he had been wearing at the time of the shooting. (App'x p. 10). Officers then attempted to speak with him about the incident, and he agreed to an interview after waiving his rights. (App'x p. 10). Initially, during that interview, Cwiklinski denied firing a weapon at all. (App'x p. 10). However, when confronted with the surveillance footage, Cwiklinski pivoted to the truth and admitted he was, in fact, the shooter. (App'x pp. 10-11). He further revealed he had disposed of his gun after the incident by tossing it into the Broad River. (App'x pp. 10-11).

As a result of the incident, Cwiklinski was indicted for numerous offenses, including multiple counts of attempted murder. (App'x pp. 30-35). However, following negotiations with the State, he was permitted to plead guilty to reduced charges of ABHAN instead of attempted murder along with possession of a weapon during the commission of a violent crime. (App'x p. 3). In addition to that, the State agreed to dismiss Cwiklinski's other pending charges—including two additional counts of attempted murder—that stemmed from earlier incidents. (App'x p. 13).

During the ensuing guilty plea hearing, Cwiklinski, who was twenty-one years old at the time, confirmed he was pleading guilty to two counts of ABHAN along with the related weapon

charge and personally acknowledged he understood he could potentially be sentenced to up to forty-five years for those offenses. (App'x p. 3; p. 6). He further confirmed he understood the constitutional rights he was surrendering by entering his plea, was aware of the "violent" and "serious" nature of the ABHAN offenses, and had decided to plead guilty without having been threatened, coerced, or promised anything. (App'x pp. 4-6). Thereafter, the solicitor recounted the facts and circumstances of Cwiklinski's crimes, asked for the imposition of a twenty-year sentence, and noted Cwiklinski had already received a substantial benefit by virtue of the dismissals and reductions afforded to him.[3] (App'x p. 17). Following the solicitor's remarks, Cwiklinski personally confirmed the articulated facts were accurate and again verified he wished to plead guilty. (App'x pp. 7-11; pp. 17-18). The plea judge then accepted Cwiklinski's guilty plea as freely and voluntarily entered. (App'x p. 18).

Once the plea had been accepted, defense counsel spoke on Cwiklinski's behalf, indicated the defense was appreciative of the offer that had been extended by the State, identified a number of factors she believed were relevant to sentencing, and proposed a sentence of seven years of imprisonment with additional time suspended. (App'x pp. 18-25). Amongst the factors identified for mitigation purposes, defense counsel asserted Cwiklinski had always wanted to accept responsibility for his crimes, he was relatively young in age, he had obtained his GED and

[3] Notably, amongst the ways he benefitted from the dismissals and reductions, Cwiklinski was able to completely avoid a mandatory sentence of life without parole, which potentially could have been imposed if he was convicted of at least one of his attempted murder charges from the February 2012 incident prior to being convicted of an attempted murder charge from the more-recent incident that occurred in February of 2013. See S.C. Code Ann. § 17-25-45 (mandating "a person must be sentenced to a term of imprisonment for life without the possibility of parole" upon conviction for a "most serious" offense if the person has previously been convicted of another "most serious" offense and classifying attempted murder as a "most serious" offense); cf. Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (concluding Bryant was properly sentenced to life without parole as a recidivist offender based on his commission of and conviction for multiple separate armed robberies that occurred on different days at different locations and involved different victims).

had been enrolled at Midlands Tech at the time of his arrest, he had been raised by a single mother, his father was an addict who had never been a part of his life, he had been an average student in school, he was diagnosed with anti-social personality disorder along with other things, he had been drinking alcohol since the age of fourteen, he was drinking on the night of the shooting, he acted recklessly that night out of anger at having been "jumped" earlier on the same date, he had attempted to mentor others from jail since his arrest, he was cognizant of the serious and impactful nature of his actions, he had aspirations to enter the field of "culinary arts" one day, he wanted to better himself, and he did not ever want to end up back in prison. (App'x pp. 18-24). In addition to those remarks, defense counsel provided the plea judge with approximately twenty supportive letters written about Cwiklinski, and she identified a substantial group that had attended the plea hearing as support for Cwiklinski. (App'x pp. 21-22). Furthermore, Pollock, who was one of Cwiklinski's victims, spoke on Cwiklinski's behalf and stated he did not think Cwiklinski would try to hurt him. (App'x pp. 23-24). Likewise, Cwiklinski personally addressed the court, expressed remorse, and claimed he had not intended to hurt anyone during the incident. (App'x p. 25).

After listening to those remarks, reviewing the letters submitted on Cwiklinski's behalf, viewing the surveillance footage of the shooting, and pausing the proceedings to consider what had been presented to her, the plea judge explained the footage she saw was "surreal," frightening, and evocative of the "wild wild west." (App'x p. 14; p. 25; p. 27). The plea judge further explained she believed in "justice tempered with mercy" but indicated she thought Cwiklinski had already received mercy by virtue of his charges being reduced. (App'x p. 28). The plea judge then sentenced Cwiklinski to concurrent terms of imprisonment of twenty years

for each count of attempted murder and five years for possession of a weapon during the commission of a violent crime. (App'x p. 28; pp. 36-38).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful attempt to appeal from his guilty plea, Cwiklinski—with the assistance of counsel—submitted a PCR application seeking a new trial for a variety of different reasons. (App'x pp. 39-51). Amongst the reasons identified, Cwiklinski contended he was entitled to relief because defense counsel was purportedly constitutionally ineffective for failing to file a motion for reconsideration of the sentence "despite [his] timely and specific request." (App'x p. 42).

In response to the application, an evidentiary hearing was conducted to determine the merits of Cwiklinski's claims. (App'x p. 62). During the course of that hearing, Cwiklinski testified on his own behalf and claimed he had been under the impression he was going to receive a sentence of no more than ten years based on what defense counsel had told him. (App'x p. 69; p. 72; p. 80; pp. 87-88). Furthermore, Cwiklinski alleged he expressly instructed defense counsel to file a motion for reconsideration after his sentence was imposed, but she filed a notice of appeal instead despite him never mentioning the word "appeal" to her. (App'x pp. 77-78; p. 83). Conversely, defense counsel testified she never told Cwiklinski he would receive a maximum sentence of ten years, and she indicated she had no recollection of ever being asked to file a motion for reconsideration. (App'x pp. 98-99; p. 120; p. 125; p. 127). Defense counsel further explained she filed a notice of appeal because she was alerted Cwiklinski wished to appeal by Cwiklinski's mother, and she confirmed she noted Cwiklinski was dissatisfied with his sentence in her explanation for that appeal. (App'x p. 100; pp. 125-127).

Ultimately, after considering the matter and listening to the arguments of counsel, the PCR judge declined to grant relief. (App'x pp. 135-147). In declining to do so, the PCR judge expressly rejected as meritless Cwiklinski's claim defense counsel was constitutionally ineffective for failing to file a motion for reconsideration of the sentence. (App'x p. 147; pp. 165-166). As support for that particular ruling, the PCR judge found credible defense counsel's claim of having no recollection of being asked to file a reconsideration motion, interpreted that testimony to mean no request for such a motion was actually made, noted defense counsel took action when asked to do so by filing a notice of appeal upon request from Cwiklinski's mother, and determined there was no basis that existed for a successful motion for reconsideration under the circumstances of the case. (App'x p. 165; p. 176). Furthermore, the PCR judge concluded there was no reasonable likelihood a motion for reconsideration would have led to a different result under the circumstances involved while noting the plea judge thoroughly explained the basis for her sentence before imposing it. (App'x pp. 165-166). Accordingly, for those reasons, the PCR found Cwiklinski had failed to establish either defense counsel was deficient for failing to file a motion for reconsideration of the sentence or he was prejudiced as a result of defense counsel's actions in that regard. (App'x p. 166).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief judge correctly determined Cwiklinski failed to meet his burden of establishing defense counsel was constitutionally ineffective for not filing a motion to reconsider the sentence imposed because: (1) defense counsel was not asked to file such a motion and did not have any legitimate grounds upon which to make one that had not already been presented to and considered by the plea judge; and (2) there was no reasonable likelihood the result of the proceedings would have been different but for defense counsel's supposedly deficient performance since the plea judge was aware of and had already considered all the pertinent sentencing information prior to choosing to impose a twenty-year sentence in Cwiklinski's case.

Cwiklinski contends the PCR judge reversibly erred by not ruling defense counsel was constitutionally ineffective based on her failure to file a motion for reconsideration of the sentence imposed.[4] As support for that contention, Cwiklinski maintains defense counsel

[4] Puzzlingly, although Cwiklinski's appellate issue relates solely to defense counsel's failure to file a motion for reconsideration of the sentence imposed, Cwiklinski primarily seeks a reversal of his *convictions* along with a remand for a new trial through his request for relief on appeal. (Pet. Br. p. 11). Critically though, that requested relief would only be appropriate if Cwiklinski established there was a reasonable probability he would not have pled guilty but for defense counsel's deficient performance. See Hill v. Lockhart, 474 U.S. 52, 59 (1985) ("[I]n order to satisfy the 'prejudice' requirement [in a challenge to a guilty plea based on ineffective assistance of counsel], the defendant 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."). Since Cwiklinski is not even raising such a contention on appeal and, instead, has solely alleged there was a reasonable probability his sentence would have been different but for defense counsel's failure to file a post-plea motion, Cwiklinski could not possibly be entitled to or lawfully receive the primary relief he is now seeking. See United States v. Morrison, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."); cf. Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) ("Because Petitioner's only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense."); Rolen v. State, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009) ("[W]e hold that counsel was ineffective for failing to move to withdraw [Rolen]'s guilty plea. However, we find that granting [Rolen] the relief of an entire new plea hearing is inappropriate. Once the plea judge found that [Rolen]'s plea was voluntary and supported by a factual basis and formally accepted the plea of guilt, [Rolen] forfeited his ability to withdraw the plea as a matter of right. Accordingly, we remand the case to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea. In our view, this tailored relief remedies the precise prejudice resulting from plea counsel's deficient performance." (citations omitted)).

provided deficient representation by failing to move for reconsideration of the sentence because—at a minimum—she was on notice he was unhappy with the aggregate twenty-year sentence he received but nevertheless did not seek reconsideration before initiating an appeal. Furthermore, Cwiklinski maintains he was prejudiced by defense counsel's deficient performance because there purportedly was a reasonable probability the plea judge would have reduced his sentence if a motion for reconsideration had been filed in light of the evidence contained in the record. To the contrary, Cwiklinski did not and could not establish defense counsel engaged in deficient performance by not filing a motion seeking reconsideration of the sentence because she neither was asked to do so nor had any legitimate grounds upon which to base such a motion that had not already been presented to and considered by the plea judge. Similarly, Cwiklinski did not and could not establish the result of the proceedings would have been different but for defense counsel's supposedly deficient performance because the plea judge was aware of and had already considered all the information Cwiklinski has asserted should have been presented to her through a sentencing reconsideration motion *before* she decided to impose Cwiklinski's twenty-year sentence. Under such circumstances, the PCR judge correctly determined Cwiklinski failed to meet his burden of establishing either deficiency or prejudice in connection to defense counsel's failure to file a motion for reconsideration of the sentence. The PCR judge's order denying relief to Cwiklinski should be affirmed.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of

counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341,

343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the

conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[5] Strickland, 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just

[5] Notably, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In the case sub judice, the plea judge imposed a sentence falling squarely within the permissible sentencing range—and twenty-five years *less* than the maximum term of imprisonment allowable—for Cwiklinski's "serious" and "violent" offenses. See S.C. Code Ann. § 16-3-600(B) (mandating a penalty of "not more than twenty years" for ABHAN); S.C. Code Ann. § 16-23-490 (mandating a person convicted of possession of a weapon during the conviction of a violent crime "must be imprisoned five years, in addition to the punishment provided for the principal crime"); see also S.C. Code Ann. § 16-1-60 (classifying ABHAN as a "violent" crime); S.C. Code Ann. § 17-25-45(C)(2)(b) (classifying ABHAN as a "serious" offense). And, significantly, the plea judge only did so *after* both hearing a substantial amount of mitigation evidence presented on Cwiklinski's behalf *and* explaining why she believed the sentence she chose to impose was nonetheless still warranted under the specific facts and circumstances involved. See State v. Miller, 187 S.C. 271, __, 197 S.E. 310, 311 (1938) ("Where left to his discretion by the law, the presiding judge, in the exercise of a wise judgment, determines what sentence, within the law, would be just and proper in any particular case."). Under such circumstances, there were no legitimate or meritorious objections that could have been raised to Cwiklinski's sentence.[6] See Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) ("A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent."); State v. Dozier, 263 S.C. 267, 271, 210 S.E.2d 225, 226 (1974) (explaining a South Carolina appellate court "has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by

[6] On appeal, Cwiklinski candidly acknowledges his "sentence was within the statutory guidelines and not subject to challenge on direct appeal." (Pet. Br. p. 7).

statute"); see also Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (recognizing defense counsel cannot be constitutionally ineffective for failing to object when "there was no sustainable objection" that could have been raised).

Despite having no legitimate basis upon which to *object* to his sentence, Cwiklinski contended—and continues to contend—defense counsel was nevertheless constitutionally ineffective for failing to file a motion asking the plea judge to reconsider her reasoned sentencing decision. (Pet. Br. pp. 1-11). In so contending, Cwiklinski argues defense counsel's performance was supposedly deficient because she did not file a motion for reconsideration of the sentence despite being—at a minimum—aware he was dissatisfied with his sentence. (Pet. Br. pp. 7-9). Cwiklinski further argues he was allegedly prejudiced by defense counsel's deficient performance because there was purportedly "evidence in the record from which the plea judge, not the PCR judge, could have based a reduction in sentence." (Pet. Br. p. 9). More specifically, Cwiklinski points to the facts none of the victims were physically injured and one of them even spoke on his behalf *during the guilty plea hearing*, which were unquestionably facts known to the plea judge at the time she sentenced Cwiklinski. (Pet. Br. p. 9). Thus, in essence, Cwiklinski's position on appeal is the PCR judge reversibly erred by not concluding there was a reasonable probability the plea judge would have reconsidered the sentence she determined was appropriate under the circumstances involved if she had been presented with a motion calling her attention to facts she was already fully aware of at the time of sentencing.

Just as the PCR judge wisely recognized when presented with such assertions, Cwiklinski failed to meet his burden of establishing defense counsel's performance fell below the prevailing standard of professional norms by virtue of her not filing a motion for reconsideration of the sentence on his behalf. Likewise, Cwiklinski further failed to establish there was a reasonable

likelihood the result of the proceedings would have been different but for defense counsel's failure to file such a motion. Therefore, just as the PCR judge correctly determined, Cwiklinski did not—and could not—meet his burden of establishing his defense counsel was constitutionally ineffective, and, as a result, Cwiklinski's PCR application was properly denied.

First, demonstrating the correctness of the PCR judge's determination as to deficiency, Cwiklinski—based on factual findings made by the PCR judge—never truly asked defense counsel to file such a motion. In the absence of such a request or—at the very least—some apparent basis upon which sentencing reconsideration could be justified, it was not inconsistent with prevailing professional norms for defense counsel to choose not to file a purely discretionary motion she was never asked to file and had no obvious reason to file under the circumstances involved.[7] See People v. Owens, 899 N.E.2d 625, 631 (Ill. App. Ct. 2008) (instructing "the decision not to file a motion to reconsider sentence—thereby waiving any later challenge to a defendant's sentence—is . . . a matter left ultimately to counsel's professional judgment and discretion"); Commonwealth v. Velasquez, 563 A.2d 1273, 1275 (Pa. Super. Ct. 1989) (explaining counsel cannot "be deemed ineffective for failing to do what he was not requested to do"); see also Dunn v. Reeves, __ U.S. __, 141 S. Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant

[7] Notably, the fact defense counsel did not expressly state she was not asked to file a motion for reconsideration and, instead, only testified she could not recall being asked to file one did *not* preclude a finding defense counsel provided reasonable professional assistance. See Williams v. Head, 185 F.3d 1223, 1227-1228 (11th Cir. 1999) (explaining an attorney can still be presumed to have done what the attorney should have done even when the attorney cannot specifically recall what occurred due to the passage of time); see also Titlow, 571 U.S. at 23 ("It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" (citation, internal quotations, and brackets omitted)).

relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." (citation, internal quotations, and brackets in original omitted)).

Second, even assuming defense counsel should have interpreted Cwiklinski's dissatisfaction with his sentence and accompanying request for an appeal as truly constituting a desire for her to file a motion for reconsideration, nothing appearing in the record—or identified by Cwiklinski—constituted a legitimate basis upon which a viable or meaningful reconsideration motion could be made. Instead, the record only contained—and Cwiklinski has only pointed to—matter already presented to and considered by the plea judge prior to her deciding upon the sentence she believed was appropriate based on the circumstances involved, and the sentence ultimately imposed was entirely unobjectionable as it fell squarely within the applicable sentencing limits. See Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) ("A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant."); see also State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion."). Thus, since there were no objections that could have been raised to the sentence or any new matters relevant to Cwiklinski's sentence that could have been called to the plea judge's attention that she had not *already* been fully aware of at the time of sentencing, defense counsel did not have viable or compelling grounds upon which to ask the plea judge to reconsider her sentencing decision in Cwiklinski's case and, as a result, could not have been deficient for failing to file a motion simply repeating the same request for more leniency that had already been advanced to and

rejected by the plea judge.[8] See People v. Bailey, 846 N.E.2d 147, 150 (Ill. App. Ct. 2006) ("Clearly, general failure to file a motion to reconsider sentence does not per se amount to ineffective assistance of counsel, as some basis must exist to make the motion."); see also Cox v. State, 832 S.E.2d 354, 360 (Ga. 2019) ("[C]ounsel cannot be deficient for failing to make a meritless objection."); cf. State v. Myers, 981 So. 2d 214, 231 (La. Ct. App. 2008) (concluding Myers failed to establish his defense counsel was constitutionally deficient for failing to move to reconsider the sentence because he did "not specify what additional sentencing issues he would have raised had his attorney filed a timely Motion to Reconsider Sentence"); Commonwealth v. Gray, 608 A.2d 534, 551-552 (Pa. Super. Ct. 1992) ("[Gray] has not provided this court with any information which would indicate that the lower court committed an error of law or abuse of discretion in imposing sentence, or that the court imposed a sentence which was manifestly excessive. Without such specific allegations, we are unable to hold that [Gray] has set forth even an arguable claim of ineffectiveness with regard to counsel's failure to file a motion to reconsider sentence."). Accordingly, Cwiklinski—just as the PCR judge correctly concluded—failed to establish defense counsel was deficient for not filing a motion for reconsideration of the sentence imposed.

Beyond that, the PCR judge correctly determined Cwiklinski failed to establish the result of the proceedings would have been different but for defense counsel's supposedly deficient performance, which was necessary before a grant of relief could be warranted. See State v.

[8] And, the lack of deficiency on defense counsel's part is further supported by the fact defense counsel successfully obtained a substantial benefit for Cwiklinski through her negotiations with the State, which resulted in reductions and dismissals of charges that *greatly* reduced the maximum potential term of imprisonment Cwiklinski was facing when he entered his guilty plea. Cf. State v. Jones, 80 So. 3d 500, 503 (La. Ct. App. 2011) ("Considering what trial counsel had to work with, and the exposure to more than a century of prison time, this defendant got the deal of the century. To urge ineffectiveness is somewhat stunning.").

Brooks, 260 So. 3d 713, 715-716 (La. Ct. App. 2018) ("The mere failure to file a motion to reconsider sentence does not in and of itself constitute ineffective assistance of counsel. A basis for ineffective assistance of counsel may only be found if a defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different."). Demonstrating the correctness of the PCR judge's determination as to prejudice, defense counsel—prior to the plea judge's imposition of Cwiklinski's aggregate twenty-year sentence—identified a number of potentially mitigating factors to the plea judge and provided the plea judge with other information in an effort to obtain leniency, including numerous letters written on Cwiklinski's behalf and a supportive statement from one of his victims. In addition to that, the plea judge was *also* presented with the specific facts of Cwiklinski's crimes, heard from Cwiklinski's other victim, and viewed the disturbing surveillance footage of the incident. Based on that, the plea judge was fully aware of all the pertinent information—including the information Cwiklinski now contends "*could* have" supported a reduction in sentence—related to Cwiklinski and his crimes prior to imposing the twenty-year sentence she believed was appropriate under the circumstances involved. (App. Br. p. 9) (emphasis added). Since the plea judge had been presented with and considered all the information Cwiklinski now contends should have been called to her attention through a motion for reconsideration of the sentence, there can be and was no reasonable likelihood the plea judge would have reconsidered her reasoned sentencing decision based on mitigation information *she had already considered*. Cf. United States v. Rangel, 781 F.3d 736, 746 (4th Cir. 2015) ("Rangel points to no argument or factor that his counsel should have raised that the district court failed to consider and which might have changed its view. He accordingly fails to establish prejudice to support his claim that his trial counsel rendered ineffective assistance at sentencing by failing to object to the drug

weight finding."); People v. Brown, 75 N.E.3d 445, 466 (Ill. App. Ct. 2017) ("Here, there is not a reasonable probability that the sentence would have been different if counsel had filed a motion to reconsider the sentence. A motion to reconsider the sentence would not have changed the result where the mitigating evidence that defendant highlights was considered by the trial court at the sentencing hearing."); State v. Shirley, 945 So. 2d 267, 271 (La. Ct. App. 2006) (concluding Shirley's claim defense counsel was ineffective for failing to move for reconsideration of the sentence was "meritless" because Shirley failed to prove his sentence would have been different but for defense counsel's actions in light of the fact: (1) the record established the plea judge considered the appropriate sentencing factors before imposing the sentence; (2) the sentence imposed was tailored both to the offense and the offender; and (3) Shirley received a significant reduction in the potential maximum sentence he was facing since multiple other charges were dismissed as part of the plea bargain). Resultantly, Cwiklinski did not—and could not—satisfy his burden of establishing there was a reasonable likelihood the outcome of the proceedings would have been different had his defense counsel filed a motion for reconsideration that simply called the plea judge's attention to information that she had already considered for sentencing purposes. See Commonwealth v. Reaves, 923 A.2d 1119, 1131-1132 (Pa. 2007) (explaining the only way counsel can be deemed constitutionally ineffective for failing to file a motion to reconsider the sentence is when the individual seeking relief proves the filing of such a motion "would have led to a different and more favorable outcome" at sentencing); see also Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (explaining mere speculation standing alone cannot satisfy an applicant's burden of establishing prejudice).

Because Cwiklinski's defense counsel's act of not filing a motion seeking reconsideration of the sentence under the circumstances involved did not constitute objectively unreasonable

representation inconsistent with prevailing professional norms and because Cwiklinski did not suffer any actual prejudice as a result of his defense counsel's actions, the PCR judge correctly concluded Cwiklinski failed to meet his required burden of establishing both deficiency and prejudice, and her ruling in that regard was neither unsupported by the evidence appearing in the record nor clearly erroneous. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."); see also Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a post-conviction relief judge's factual finding will be upheld if supported by any evidence and a post-conviction relief's judge's decisions will only be reversed where controlled by an error of law). Accordingly, Cwiklinski's PCR application was properly denied and dismissed. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). The PCR judge's order should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

March 10, 2023