

RECEIVED
MAR 22 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE BRIAN M. GIBBONS
2021-CP-42-01964

DERRICK MILLER, SCDC# 384656

APPELLANT,

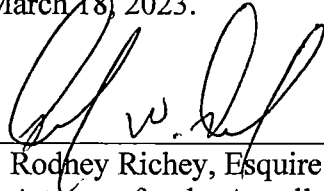
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Derrick Miller appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Brian M. Gibbons, Circuit Judge on February 13, 2023 an Order issued on March 16, 2023 and filed on March 17, 2023. The Appellant received notice of the judgment on March 18, 2023.



Rodney Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, SC 29603
(864) 467-0503
(864) 467-0646 fax

Other Counsel of Record:
Chelsey Marto, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

charge. Additional charges consisting of attempted murder and kidnapping were dismissed as a part of the plea agreement. The State recommended a sentence consisting of twenty years', suspended to a term of active imprisonment between ten and fifteen years' with five years' probation. Judge Hayes sentenced Applicant to twenty years' imprisonment, suspended upon service of fifteen years' followed by five years' probation.

Applicant filed a timely notice of appeal on January 11, 2021, which was dismissed by the South Carolina Court of Appeals for failure to provide a sufficient explanation, as required by Rule 203(d)(1)(B)(iv), SCACR. Applicant subsequently filed two petitions, which the Court construed as petitions for rehearing on March 19, 2021 and March 22, 2021, respectively. These were denied on May 13, 2021. Applicant subsequently filed a motion for bail and motion to substitute counsel, which were both denied on June 16, 2021. The remittitur was issued on June 28, 2021.

Summary of Relevant Facts

On November 12, 2019, officers were dispatched in reference to a weapon being discharged. (Tr. 11). Dispatch advised a female was shot and the shooter was on scene. (Tr. 11). When officers arrived, Applicant came outside with his hands in his pockets and refused to comply when officers ordered him to remove his hands from his pockets. (Tr. 11). Applicant produced a firearm from his pants and began walking towards the officer. (Tr. 11). After multiple commands, Applicant put the weapon on the ground. (Tr. 11).

Officers found the victim in the home with a gunshot wound to her hip and leg. (Tr. 11). The victim stated that the Applicant shot her because he did not want her to leave the residence. (Tr. 11). She was transported to the hospital for treatment. (Tr. 11).

Applicant's mother stated that when she saw the victim was shot, she tried to call the

FILED
2023 MAR 17 AM 11:55
CLERK OF COURT
STATE OF SOUTH CAROLINA

FILED



police, but Applicant took her phone and pushed her down. (Tr. 11-12). Applicant waived *Miranda* and agreed to speak to law enforcement. (Tr. 12). Applicant objected to being charged with attempted murder, stating that being shot in the leg might hurt, but will not kill anyone. (Tr. 12). Applicant stated that the victim was trying to burn his personal items, which he found to be disrespectful. (Tr. 12). Applicant stated his attempt was to shoot the victim if she attempted to burn his items, which he thought she had, though there was no proof she actually burned anything. (Tr. 12). Applicant admitted to shooting the victim, and said the victim was shocked he shot her. (Tr. 12). In response, he said "I told you not to do anything to my – to my things." (Tr. 12).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "Wrong Evidence."
 - a. *Brady* material.
2. Involuntary guilty plea.
3. Ineffective assistance of counsel.

By amendment dated July 25, 2022, Applicant, through PCR Counsel, alleged:

1. Ineffective assistance of counsel
 - a. For communicating with the prosecutor that Applicant declined a ten-year plea offer which he did not do.
 - b. For not presenting a defense that Applicant was defending his personal property.
 - c. For failing to establish communication between him and Counsel during the plea or requiring the Court to establish a line of communication.
 - d. For not advising Applicant of the State's recommendation prior to the guilty plea.
 - e. For failing to properly communicate with the Applicant about the case.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel.
 - a. For communicating with the prosecutor that Applicant declined a ten-year offer when he did not.

FILED



- b. Failure to present a defense that he was defending his personal property.
 - c. Failure to inform Applicant of the recommended sentencing before the plea.
 - d. Failure to properly communicate with Applicant about the case.
2. Invalid plea.
- a. Applicant thought he was entering a plea to a recommended ten years' imprisonment.
 - b. There was no direct line of communication between Applicant and Counsel established on record.
 - c. Applicant was deprived of his right to a trial because of COVID.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he was represented by Counsel. He stated that he thought Counsel was ineffective. He stated he was sentenced to twenty years' imprisonment. He stated that he pled guilty but wanted a trial. He stated he discussed the plea with Counsel. He stated that he was incarcerated at the Spartanburg County Jail. He stated that Counsel was not with him at the time of the plea. He stated that he was confused by the plea hearing because he thought he was pleading to a ten-year recommended sentence. He stated that the sentence length was increased at the plea hearing. He stated that this was new to him, and he did not have access to Counsel to discuss this with him. He stated he never declined the ten-year offer.

He stated the incident was rooted in a verbal disagreement with his partner. He stated he shot her in the leg when she threatened to burn his belongings. He stated he did not consider taking the lighter from her. He stated he agreed with most of the facts, including the fact that he shot her.

He stated he wanted a trial, but they were not happening during COVID. He stated he wanted to plead to get it over with. He stated that a plea was his only option at the time. He

XCO 7/11/20
 THE STATE OF SOUTH CAROLINA
 CLERK OF COURT
 2023 MAR 17 AM 11:55

FILED

stated he was in county for fourteen months prior to the plea. He stated he was never told he could not talk to Counsel at the time. He stated he waived his rights at the hearing.

Counsel Testimony

Counsel testified that the plea hearing occurred via WebEx and all three parties were in separate rooms. He stated that Applicant needed to ask for a phone if he wanted to contact Counsel. He stated he did not know if Applicant knew this was an option. He stated that based on the PCR testimony, a phone call in the middle of the plea hearing would have been beneficial. He stated that Applicant was offered two plea options: a negotiated ten years and an open plea to a recommended range for ten to fifteen active time. He stated Applicant wanted the second deal because he hoped he could convince the judge to give him a lighter sentence. He stated Applicant did not want to serve ten years in prison. He stated they discussed the case and facts. He stated that Applicant's police statements were very detrimental because Applicant stated he would do it again. He stated Applicant kept switching between pleading or proceeding to trial. He stated that Applicant wanted to plead to DVHAN instead of attempted murder. He stated that Applicant sent him messages about the plea. He stated he did not think Applicant knew he could ask to contact Counsel during the plea. He stated that he recommended Applicant take the negotiated plea, but Applicant elected to take the recommended plea instead. He stated that Applicant was ultimately confident in his decision to plead.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the direct appeal records, the plea transcript, and the current PCR

FILED



application. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. Counsel is strongly presumed to have rendered adequate assistance

FILED



and made all significant decisions in the exercise of reasonable professional judgment.”
Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies: if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Invalid Plea

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant’s right

FILED

to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Warner v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional

FILED

defects and defenses, including claims of a violation of a constitutional right prior to the plea.”
Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

This Court finds that the plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated he intended to enter a plea to the charge as announced by the prosecutor. (Tr. 6). Applicant stated he did not take any substance affecting his ability to understand the plea process, was never treated for substance abuse issues. (Tr. 8-9). Applicant stated he was satisfied with Counsel and that he was entering the plea freely and voluntarily. (Tr. 9). Applicant stated that he understood by entering the plea he was waiving his right to a trial where he is presumed innocent, and all twelve members would have to find him guilty beyond a reasonable doubt. (Tr. 9-10). Applicant waived his right to call and confront witnesses, to present evidence establishing a defense, the right to subpoena, and the right to remain silent. (Tr. 10). Applicant agreed to the facts, stated he understood Judge Hayes was not bound to the State’s recommendation as to sentencing, and that he could face up to twenty years’ imprisonment. (Tr. 13). Applicant stated that he understood the charge pled to was classified as both violent and serious and that he talked to Counsel about the consequences and ramifications of the classifications. (Tr. 13). Applicant stated he still wanted to plead, that he was in fact guilty of the charge pled to, and all his answers to the questions were truthful and honest. (Tr. 14). Accordingly, this Court finds that the plea was freely, knowingly, intelligently, and voluntarily entered and cannot be withdrawn now.

Ten-Year Offer

Applicant claims Counsel was ineffective for telling the State Applicant was rejecting the ten-year plea offer. However, Counsel credibly testified that Applicant was presented with two plea offers: one to a negotiated ten years and the other to a recommended sentencing range of

2023 MAR 17 AM 11:56
CLERK OF COURT
JUNIOR COUNTY
COURTHOUSE
MOUNTAIN VIEW

FILED

between ten and fifteen years, active time. Counsel credibly testified that Applicant was aware of both offers and opted for the second offer because he was hoping the mitigation evidence presented would leave him with an active sentence of less than ten years. Thus, this Court finds that Applicant did reject the ten-year offer and allegations to the contrary are not credible. Accordingly, relief is denied on this ground.

Failure to Assert a Defense

Applicant claims Counsel was ineffective for failure to assert a defense that Applicant shot the victim because he was protecting his personal property. The right to assert this defense was waived through entry of an otherwise valid plea. Accordingly, relief is denied on this ground.

Failure to Inform Applicant of Sentencing Recommendation

Applicant claims Counsel was ineffective for failure to inform Applicant of the sentencing recommendation. Counsel credibly testified that he told Applicant about the two offers and the sentencing negotiations or recommendations associated with each. Additionally, the plea transcript shows that the recommendation was conveyed to Applicant at the plea hearing and he was informed that the Court is not bound to the recommendations. (Tr. 5-6, 13). Accordingly, relief is denied on this ground.

Failure to Properly Communicate

Applicant alleges that Counsel was ineffective for failure to effectively communicate with Applicant. “[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating “how additional preparation or communication would have resulted in a different outcome.” *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d

2023 MAR 17 AM 11:56

FILED

768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant has failed to state with any specificity what Counsel did not communicate with him about or why it would have caused him to proceed to trial instead. Accordingly, Applicant has failed to meet his burden of proof concerning this allegation and relief is denied as a result.

No Direct Line

Applicant claims Counsel was ineffective for failure to establish a direct line of communication between Applicant and Counsel during the plea. Any failure to establish a direct line of communication between Applicant and Counsel during the plea was non-prejudicial. The plea hearing transcript itself reflects that the plea was entered freely, knowingly, intelligently, and voluntarily. There was no denial of the right to speak to Counsel. If Applicant was explicitly forbidden from speaking with Counsel during the proceedings, the analysis may be different. Instead, the record remains silent on this issue and there has been no showing of a denial of a direct line to Counsel because no attempt on Applicant's part to speak to Counsel was ever made. Regardless, even if there was a denial of communication, there has been no showing of prejudice. Accordingly, relief is denied on this ground.

COVID

Applicant claims his plea is invalid because he was forced into pleading during COVID times because trials were not being held at the time. This, by itself, is not enough to undercut an

otherwise valid plea. Accordingly, relief is denied.

Conclusion

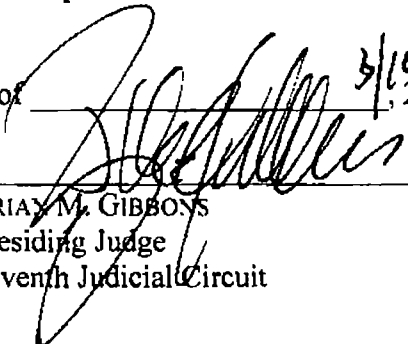
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. 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 appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of _____, 2023.



 BRIAN M. GIBBONS
 Presiding Judge
 Seventh Judicial Circuit

_____, South Carolina.

CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA

2023 MAR 17 AM 11:56

FILED