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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

G. D. Morgan , Circuit Court Judge

Lower Case No.: 2020-CP-42-00569
2020-CP-42-002664

Michael E. Kelley, II #361692,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Michael E. Kelley, II #361692 appeals the order of the Honorable G. D. Morgan dated and filed February 27, 2023. Appellant received written notice of entry of this order on April 10, 2023.

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Irmo, South Carolina
April 11, 2023

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Michael E. Kelley, II, #361692, Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-42-00569 2020-CP-42-002664 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief applications filed February 11, 2020, and August 11, 2020, respectively. Respondent made its return to the first application on March 16, 2020, requesting an evidentiary hearing be convened. Respondent made its return and motion to merge the applications concerning the second application on October 16, 2020. An evidentiary hearing was held at the Spartanburg County Courthouse. Tommy Thomas, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel David Braghirol, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its January 2019 term, the Spartanburg County Grand Jury indicted Applicant for distribution of fetanyl (2019-GS-42-0323), two counts of distribution of heroin (2019-GS-42-0320 and -0322), two counts of

trafficking heroin (2019-GS-42-0317 and -0318), and possession with intent to distribute marijuana (2019-GS-42-00314). During its March 2019 term, the Spartanburg County Grand Jury indicted Applicant for felony DUI - death (2019-GS-42-1688) and DUS/driving under suspension (2019-GS-42-1687). Applicant was represented by David A. Braghirol, Esquire. Solicitor Barry Barnette of the Seventh Circuit Solicitor's Office prosecuted the case. On July 8, 2019, Applicant appeared before the Honorable R. Keith Kelley, circuit court judge, and pled guilty as indicted to all of the aforementioned charges without any negotiations or recommendations. Judge Kelley sentenced Applicant to twenty five years for the felony DUI and death charge, fifteen years for the fentanyl charge, fifteen years for the felony DUI great bodily injury charge, fifteen years for the cocaine (-0320) charge, fifteen years for the heroin (-0318) charge, twenty-five years for the other heroin (-0317) charge, fifteen years for the other cocaine (-0322) charge, five years for the marijuana charge, and thirty days for the driving under suspension charge, with all sentences running concurrently with exception to the fentanyl sentence, which ran consecutively.

Applicant appealed his sentence to the South Carolina Court of Appeals, and the appeal was dismissed for want of a sufficient explanation, required by Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was issued on December 30, 2019. Applicant timely filed a PCR claim on February 11, 2020.

Summary of Relevant Facts

On November 16, 2017, narcotics agents and a confidential informant conducted a search of Applicant's home and a drug buy involving 5.14 grams of heroin. (Plea Tr. 33). On November 30, 2017 there was a second purchase at the same home as before, this time concerning 1.1[illegible] grams of heroin. (Plea Tr. 33). The third purchase was on March 7, 2018. (Plea Tr. 33). Thi[illegible]

purchase concerned .13 grams of fentanyl and occurred at a different address, from inside a car. (Plea Tr. 34). Warrants were obtained on the three purchases. (Plea Tr. 34). Officers went to Applicant's home on July 19, 2018 to execute the warrant. (Plea Tr. 34). When the officers entered the home, they smelled marijuana. (Plea Tr. 34). Marijuana was on a television and when the officers started questioning Applicant and his girlfriend, they consented to the search. (Plea Tr. 34). The officers searched both the home and the car. (Plea Tr. 35). They found two bags of heroin: one containing 13.83 grams and the other containing 6.62 grams. (Plea Tr. 35). They also found three bags of marijuana: the first containing 4.69 grams, the second containing .27 grams, and the third containing .35 grams. (Plea Tr. 35). He was on a $34,000 bond when this occurred, without conditions. (Plea Tr. 35).

On February 8, 2019, the Applicant was charged with felony DUI after running a red light and causing a three-car wreck, causing the death of the other drivers' son, who was a passenger in her car. (Plea Tr. 35-36). The driver herself sustained three broken ribs and a concussion, among other injuries. (Plea Tr. 36). When the officers arrived, they smelled marijuana in the car and found a baggie of marijuana in the car. (Plea Tr. 36). Applicant was also found to be driving under suspension. (Plea Tr. 36).

Current Action Before this Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. Defense counsel was ineffective by:
   a. "advising me to plead guilty."
   b. "entrapment."[1]

In his subsequent application, filed August 11, 2020, Applicant, through Counsel,

[1] Respondent interprets this allegation as "failure to pursue an entrapment defense."

alleged:

1. Ineffective Assistance of Counsel.
2. Involuntary Guilty Plea.

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

1. Ineffective Assistance of Counsel.
    a. Failure to pursue an accident reconstruction investigation.
    b. Failure to move to suppress the drugs.
    c. Failure to hire a private investigator.
    d. Failure to show the discovery in the DUI case.
    e. Failure to assert he was not intoxicated at the time of the car accident.
2. Invalid Plea.
    a. Trial tax.
    b. Applicant did not want to plead based upon the advice of a jailhouse lawyer.

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

Counsel Testimony

Counsel testified that Applicant is a nice person and was always honest with him. Counsel testified that Applicant incurred his first set of charges, made bond, and then incurred his second set of charges. Accordingly, Counsel testified that if the matter proceeded to trial he would have had to try the two sets of charges separately. He stated Applicant had a lot to lose going to trial. He testified that the drug charges were a slam dunk for the State, but that the DUI was triable. He stated that plea negotiations with the State blew up once Applicant was charged with the DUI. He stated that Applicant was given unfounded advice from a jailhouse lawyer. He stated Applicant was facing substantial time if he proceeded forward with both trials. He stated he was authorized to speak to Applicant's brother on the felony DUI charge to discuss Counsel's issues and positions. He stated that Applicant was in custody at the time of the plea. He stated

that he did not recall if Applicant talked to his family before the plea. He stated he spoke with Applicant's relatives but did not recall if Applicant talked to the family right before the plea. He stated he thought Applicant's family was present initially but did not think they were present in the afternoon. He stated that Attorney James Cheek had significant dealings with the jailhouse lawyer and spoke to Applicant with Counsel about the issues raised by the jailhouse lawyer.

Counsel testified that Applicant's plea was scheduled for the morning and was ready to proceed forward with the plea when Applicant stated he changed his mind and wanted to proceed to trial. He stated that the plan then changed to proceeding to trial that afternoon or the next day. He stated that Applicant decided to plead again after talking to Cheek and Counsel. He stated that this conversation lasted about thirty to sixty minutes. He stated that an accident reconstruction was possible at trial, but the case was not ready to proceed to trial. He stated that raising the issue of the blood draw was also available if they went to trial, but Applicant decided to plead. He stated Applicant was seemingly remorseful for what happened. He stated he did not promise him anything concerning sentencing and that they both knew that it would be harsh.

Applicant Testimony

Applicant stated that he received a total of forty years' imprisonment. He stated he was on bond for drugs and then got picked up again on the felony DUI. He stated he was detained for six months prior to the plea. Applicant stated he understood the risks of proceeding forward with a PCR hearing, despite knowing the remedy available and the risks associated with proceeding forward.

Applicant testified that Counsel was hired after he picked up the drug charges and stated that he wanted the drugs suppressed because his girlfriend was threatened into consenting to the search. He stated he was unsure how they would defend the drug charges and did not have a

private investigator. He stated he received advice from a jailhouse lawyer who told him he had missing discovery. He stated that copies of the discovery in the case were received.

He stated that the case was complicated by the DUI charge. He stated he asked for Counsel to speak with him but was told he was busy. Applicant stated that he thought he could have beat charges in court. He stated that Counsel told him to plead. He stated he pled guilty on the drug charges and pursuant to *Alford* on the DUI. He stated he did not think he was guilty of a DUI. He stated he did not know anything about the DUI case and did not see the discovery. He stated that he was told he may have to hire a toxicologist.

He stated that he thought he could have beat the case with the jailhouse lawyer. Applicant testified that Counsel and James Cheek, Esquire, met with him to discuss the plea, which led to him deciding to plead again. He stated that they told him that the optics of a black man killing a little white boy were poor and that he would receive a lot of time at trial. He admitted he hit the car and killed the child but denied being on drugs at the time.

He stated he did not think his plea was voluntary, knowing, and intelligent. He stated that the drugs were his and that he dealt them. He stated he still lives with what he does today. He stated he was willing to accept punishment for what happened.

He stated he knew that the jailhouse lawyer was not a licensed attorney. He stated that he trusted the jailhouse lawyer. He stated he pled because he was afraid of more time at trial.

Solicitor Testimony

Solicitor testified that Applicant was found with active THC in his system, indicating that he was high at the time of the accident. Solicitor stated that all trial exhibits were entered at the plea hearing. Solicitor testified that he knew the jailhouse lawyer and that the Attorney General's Office investigated his unauthorized activity.

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 the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and both PCR action's records. 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 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

Here, the plea was freely, knowingly, intelligently, and voluntarily entered. 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 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 6, 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 *Harres 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 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).

The plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated he understood the sentences, charges, elements, and fines associate with all the charges he was pleading to. (Tr. 15-18, 21-26). He stated he was not on medication or substances and that he was not forced or coerced into pleading. (Tr. 19). He stated he understood he had the right to trial. (Tr. 19). He stated he understood the violent and serious distinctions associated with some of the charges. (Tr. 21-26). He waived his rights to remain silent, to a jury trial, and to call and confront witnesses. (Tr. 26). He stated that the plea was entered freely and voluntarily. (Tr. 28). He stated he had enough time to talk to Counsel, that Counsel answered his questions and showed him his discovery, that he worked hard for him, and that he did not need more time with Counsel. Accordingly, the plea was entered freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now.

Failure to Pursue Accident Reconstruction Investigation

Applicant claims Counsel was ineffective for failure to investigate an accident reconstruction. *Strickland* makes clear that defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger

ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* At the PCR hearing, Applicant is required to present evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, whether Applicant was prejudiced by Counsel's failure to investigate is contingent on whether the evidence presented would have led Counsel to change his recommendation regarding the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

Applicant claims Counsel was ineffective for failure to pursue a crime scene investigation. However, Applicant failed to show what that investigation would have produced or how that investigation would have impacted the recommendation as to the plea. Applicant has failed to meet his burden of proof and relief is denied accordingly.

Failure to Move to Suppress the Drugs

Applicant claims Counsel was ineffective for failure to move to suppress the drugs. However, Applicant waived this right by entering his plea. Additionally, Applicant has failed to establish how the motion would have been successful or why the possibility of moving to suppress the drugs would have caused him to proceed to trial. Accordingly, relief is denied on this ground.

Failure to Hire a Private Investigator

Applicant claims Counsel was ineffective for failure to hire a private investigator. However, there was no showing at the PCR hearing that the investigator would have produced anything advantageous in Applicant's case. This Court finds Applicant has failed to meet his burden of proof in showing Counsel was unreasonable in failing to hire an investigator and no

evidence of prejudice has been shown. Accordingly, relief is denied on this ground.

Failure to Show DUI Discovery

Applicant claims Counsel was ineffective and his plea invalid because he never reviewed the DUI discovery with Counsel. This Court finds this improbable, particularly considering Applicant's representation to the plea hearing that Counsel reviewed the discovery with him and turned over all information he had about the case. (Tr. 29-30). Regardless, Applicant has failed to show what discovery he wished he had seen and how it would have caused him to proceed to trial instead. Accordingly, Applicant has not met his burden of proof and denies relief accordingly.

Failure to Assert he was not Intoxicated at Time of Accident

Applicant claims Counsel was ineffective for failure to argue that Applicant was not intoxicated at the time of the accident. This defense was waived as a result of an otherwise valid plea and Applicant is not entitled to relief as a result.

Trial Tax

Applicant contends that he was essentially coerced into pleading because he was afraid of a harsher sentence if he went to trial. Being informed that if he went to trial, he would face more time in prison does not rise to the level of coercion and is not enough to render the plead invalid. Accordingly, relief is denied on this ground.

Jailhouse Lawyer

Applicant claims his plea was coerced because a jailhouse lawyer convinced him to proceed to trial instead. However, this issue was seemingly dispelled with, as the plea transcript and Counsel's and Solicitor's credible testimonies suggest. (Tr. 38, 46). There is no indication that this advice impacted Applicant's decision after the issue was resolved by Applicant meeting

with Counsel and Attorney James Cheek. Accordingly, relief is denied on this ground.

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 the 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), SCRCP 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 27th day of February, 2023.

G.D. MORGAN
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.