STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2019-000448

JARRET GRADDICK, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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Probative evidence supports the PCR court's finding that Petitioner pled freely and voluntarily, in order to avoid the risk of life without parole, and the trial court merely explaining the consequences of a trial verdict that would result in life without parole and explaining what life without parole means does not render a plea involuntary.

STATEMENT OF THE CASE

Petitioner pled to two kidnapping charges and two armed robbery charges on July 7, 2014, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). The Honorable Roger Young sentenced Petitioner to a negotiated twenty years' imprisonment for each charge, running concurrently.

Petitioner filed an application for post-conviction relief on February 2, 2017. App. p. 24, p. 57. The State made its Return on or about July 6, 2017. App. pp. 58 - 65. An evidentiary hearing was held on December 3, 2018 before the Honorable G. Thomas Cooper, Jr. Petitioner, his two co-defendants: Preston Swinton and Kenneth Murray, and the solicitor testified at the hearing.

The PCR court took the matter under advisement and requested proposed orders. App. p. 139 line 25 - App. p. 140 line 8. The PCR Court issued an Order of Dismissal filed on March 13, 2019. App. pp. 145 - 162.

Petitioner appealed and filed a petition for writ of certiorari, and following the State's return to the petition, the case was transferred to this Court on March 25, 2020. This Court granted certiorari on August 12, 2022. Petitioner filed his brief and the State's Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner was indicted on two kidnapping charges and two armed robbery charges by a Charleston County grand jury on April 9, 2012. On July 7, 2014, a hearing was held before the Honorable Roger M. Young so the prosecution could convey its plea offer for the record because the prosecution understood that Petitioner intended to reject the plea offer. App. p. 2.[1]

Petitioner was previously convicted for a separate armed robbery charge and was already serving a twenty year sentence on that charge. The plea offer would allow Petitioner to plead to two counts of armed robbery and two counts of kidnapping for a twenty year sentence to run concurrent to the sentence Petitioner was already serving. If Petitioner declined the offer, the prosecution advised it would try the case and seek life without parole. App. p. 2.

Judge Young engaged in a colloquy with Petitioner to ensure Petitioner understood the significance of Petitioner's decision regarding the plea.[2] Judge Young advised Petitioner that if Petitioner was convicted of any one charge at trial, he would receive a life without parole sentence. Judge Young explained what that means: "Upon conviction of your second two strike offense, you go to jail for the rest of your life. You never get out. You never go before a parole board. The only way you get out of prison is when they take you out in a pine box to bury you." App. p. 3, lines 16-21. Judge Young explained that by the time he completed his current sentence, Petitioner still would be in his early forties and would be able to go to movies, get married, have a family, and put the "prison stuff" behind him. App. p. 5. On the other hand, if Petitioner went to trial and

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[1] Prosecutors will take these steps to avoid potential claims under case law such as Lafler v. Cooper, 566 U.S. 156, 164 (2012) (counsel's performance may be deficient for failing to relay a plea offer or may render deficient performance in advising a defendant to reject a plea offer).

[2] Additionally, Petitioner moved to have plea counsel relieved. App. p. 2 lines 5 - 17. Judge Young indicated he would not relieve counsel and delay trial.

was convicted of any of the five charges, he would not enjoy any of those things, because release from prison before his death would not be an option. App. p. 6.

Judge Young explained: "Now that is a lot to lay on a 26-year-old man, but that is the choices that are before you, all right? And there is only one person in the world that can make that decision, and that is you." App. p. 6, line 16-20.

Judge Young inquired:

> I am trying to figure out why wouldn't you take this offer [to] plead guilty to the charges in July? Because it takes life . . . without parole off the table, and you're going to be doing the 20 years that you're doing anyway, so it's almost like a no-brainer. So I am not trying to convince you. It's not my job to convince you, **but it is my job to make sure that you understand what the deal is, and I have explained what the deal is to you.**

App. p. 6, line 22 – p. 7, line 5.

Petitioner told the judge he was rejecting the offer because he "didn't do it, sir." Judge Young replied that was a good reason. But Judge Young also pointed out the downside to the decision. Judge Young then explained the concept of an Alford plea, explaining in part that the significance of an Alford plea is it allows the defendant to say, "I am innocent of these charges, but the State has made me a really good offer, and I need to take that offer because the downside to not taking this offer is bad. And so even though I'm telling you, Judge, exactly what you just told me, I didn't do it, I want you to just give me that 20-year sentence anyway because I'm already doing 20. It's a no brainer." App. p. 7, lines 7-25.

Judge Young then granted a recess to allow Applicant to talk to his attorney, Andrew Grimes, and discuss the possibility of an Alford plea. Judge Young later that day reconvened the hearing and Petitioner reported that he wished to plead pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). App. p. 10. At one point, Petitioner explained, "I would like to say, honestly, I'm

innocent of the crime, but they said it's the best offer, so I'm running with it." App. p. 20, lines 11-13. Counsel supported Petitioner's decision and advised that if the case did go to trial, that Counsel's expectation is Petitioner would likely lose the trial. App. p. 19.

Testimony from the PCR hearing

Petitioner testified he did not know why he was brought to court on July 7, 2014. Petitioner told the plea court he did not want to plead guilty and he wanted to relieve Counsel. In Petitioner's view, Counsel was "not representing him as well." Petitioner claimed Counsel only met with him three or four times, and Counsel had also represented him on his prior armed robbery charges. Petitioner testified he did not want to plead guilty because he did not commit these crimes, and he told the plea court he did not want to plead guilty. However, Petitioner was concerned after the plea court told him he would die in prison if Petitioner were convicted at trial because he was eligible for a sentence of life without the possibility of parole (LWOP). App. pp. 71-74. Petitioner testified he wanted to exercise his right to proceed to trial, and claimed the plea court and Counsel coerced him and forced him into pleading guilty. Petitioner claims he gave in to the pressure and pled to the charges. App. pp. 74-78.

Petitioner explained his understanding of an Alford plea was he still had the right to insist he was innocent, but he was pleading to get "it" over with, "because I can get a life sentence for something that I didn't do." App. p. 78, lines 7-11.

Petitioner complained he felt the plea court was calling him stupid if he did not take the plea offer. However, Petitioner testified, after having his memory refreshed, that the plea court told him it was not its job to convince Petitioner to plead guilty but it was its job to make sure Petitioner understood his options. App. 78, 82-83. Petitioner agreed the plea court informed him if he wanted to proceed to trial, Petitioner could stop the proceedings. Petitioner admitted he

informed the plea court it was his decision to plead guilty and also informed the plea court no one had forced him into pleading guilty or promised him anything in exchange for the plea. Petitioner claimed he lied when he told the plea court no one forced him to plead. App. pp. 85-86. Petitioner agreed that Judge Young advised him that he could stop the Alford proceedings at any time and elect to go to trial. App. p. 91.

Petitioner claimed he was not near the Piggly Wiggly on the night of this robbery, and he was not identified by anyone in the store. He also testified he expected Preston Swinton and Kenneth Murray to testify at trial on this armed robbery and expected they would testify Petitioner was not involved in this crime. Both Swinton and Murray were charged for the armed robbery and were codefendants. App. pp. 76-77.

Preston Swinton testified he is serving sentences for armed robbery, strong arm robbery, possession with intent to distribute, and weapons charges. One of the armed robbery convictions is for the Piggly Wiggly armed robbery. Swinton pled guilty and received a fourteen-year sentence. Swinton contended his plea was not contingent on anything, and he was not supposed to testify at Petitioner's trial, contradicting Petitioner's expectations per Petitioner's testimony above that Swinton would testify on his behalf. App. pp. 99-100.

Swinton contended Petitioner was not involved in the Piggly Wiggly robbery. App. p. 96. Swinton admitted he provided a statement to law enforcement implicating Petitioner, but claimed Investigator Hembree wrote the statement and coerced his answers. Swinton admitted he signed the statement. Swinton admitted in his statement he said Petitioner was armed with an uzi during the robbery. But Swinton claimed Investigator Hembree "coerced" him into pinpointing Petitioner by continuously bringing up Petitioner's name during the interview. App. pp. 96-98; pp. 102-03.

Swinton recalled meeting with Assistant Solicitor Shealy about this robbery, but did not recall specifics. Swinton denied telling Assistant Solicitor Shealy Petitioner had an uzi during the robbery and denied telling her about the plan to rob the Piggly Wiggly. Swinton also denied communicating with Petitioner or Petitioner's mother since being in prison. App. pp. 103-04.

While Swinton denied Petitioner was present at the robbery, Swinton testified that Murray was present that night. App. p. 98. Petitioner would next call Murray who would claim his own innocence and claim he was not at the scene of the crime.

Following Swinton's testimony, Kenneth Murray testified. Murray is serving a twenty-eight year sentence for armed robbery, but not for the Piggly Wiggly armed robbery. His charges for the Piggly Wiggly armed robbery were dismissed without prejudice. Murray claimed neither he, Swinton, nor Petitioner were involved in the Piggly Wiggly armed robbery – contradicting Swinton's testimony that both he and Murray committed the armed robbery. App. pp. 107-09.

Murray testified he was approached by law enforcement and taken into custody, but they did not have a warrant for him. He claimed he was held at the police station for ten to eleven hours, and law enforcement forced names on him. He elaborated he was denied food and water during this interview and was also denied bathroom breaks. He further claimed Investigator Hembree in a fit kicked chairs all around Murray, who was handcuffed. Murray testified he gave a statement about the Pizza Hut and Piggly Wiggly robberies in order to get away from Investigator Hembree. Investigator Hembree wrote the statement, but Murray signed the statement as being true. He further admitted he implicated Petitioner in this statement. App. p. 107, pp. 110-16.

At his trial, Murray challenged the statement to Hembree, testifying at his Jackson v. Denno hearing, which discussed both the robbery for which Murray was convicted as well as the Piggly Wiggly robbery. He admitted he testified similarly at that hearing to how he just testified at the

PCR hearing. Nonetheless the trial court denied his motion and found the statement was voluntarily provided. App. pp. 120-21.

Assistant Solicitor Shealy testified for Respondent. Shealy testified Petitioner and his co-defendants committed a string of armed robberies in the Mount Pleasant area along the Isle of Palms connector. Petitioner was charged with the armed robbery of the Cricket store, the Piggly Wiggly, and the Golden Bull. The indictment for the Golden Bull was nolle prossed. Shealy explained that none of the indictments were nolle prossed on the basis that the co-defendants were not involved in the crimes. For instance, Shealy used her discretion to dismiss Murray's armed robbery indictment for the Piggly Wiggly robbery because she did not want to use up the court's time. She testified the armed robbery of the Piggly Wiggly occurred late at night, and she had a videotape of this robbery. In the video, two bag boys at the store were seen high-fiving each other at the end of their shift, when three robbers enter the store wearing masks and carrying menacing weapons. The robbers are seen pointing firearms at the teenagers. No one at the Piggly Wiggly could specifically identify Petitioner. App. pp. 124-25.

Shealy further explained Petitioner and his co-defendants fled the scene, and Dante Smalls drove the getaway vehicle. Petitioner and Murray were identified fleeing the area, and speeding back into his yard. She explained the witness who identified the car fleeing the area gave Petitioner's and Murray's name to law enforcement and alerted law enforcement to look for them. App. pp. 124-25. She further explained the Piggly Wiggly is close to Petitioner's home, approximately three or four miles. Both Petitioner and Murray are known as troublemakers in the area, and a concerned neighbor alerted law enforcement to their odd behavior that night. App. pp. 129-31. A tipster alerted law enforcement when they were looking for Petitioner and Swinton,

and following the tip, law enforcement found both Petitioner and Swinton hiding under a house. App. p. 134.

Shealy interviewed both Swinton and Smalls in connection with this armed robbery. Shealy testified Swinton informed her Petitioner was involved in the Piggly Wiggly robbery and Petitioner carried an uzi during the robbery. She found Swinton's interview was persuasive, and it echoed her interview with Smalls. App. pp. 125-27.

Assistant Solicitor Shealy explained her plan for trial was to primarily present eyewitness testimony. She explained she would have had Swinton, Smalls, and Petitioner's neighbor testify. She further testified Petitioner's neighbor would identify Petitioner's clothing and car, and Petitioner was seen fleeing the area of the crime scene. App. pp. 126-27. Shealy explained she believed the evidence against Petitioner was strong. App. p. 139.

Shealy had Petitioner brought to court on July 7, 2014, because Petitioner rejected the plea offer she had made, and she wanted the rejection of the offer on the record. She explained because this was an LWOP-situation and she had filed LWOP-notice, she wanted everything vetted out in the courtroom. Shealy expected Petitioner was going to reject the offer and attempt to relieve Counsel. Assistant Solicitor Shealy testified neither she nor Counsel forced Petitioner into pleading guilty. Shealy described Counsel, who passed away by the time of the PCR hearing, as a zealous advocate who would not have his client plead in order to shy away from a trial. Counsel represented Petitioner in his trial on another armed robbery charge, during which they presented Petitioner's mother as an alibi witness. Shealy testified Petitioner's mother is an enabler and zealously attempts to protect Petitioner. App. 127-28. She explained Murray is easily manipulated by Petitioner and Petitioner's mother. App. 135-36.

In the PCR court's order denying relief, the PCR court found Shealy's testimony credible and found Petitioner, Murray, and Swinton's testimony was not credible. App. 158.

STANDARD OF REVIEW

On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold the findings if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. The present case does not involve a question of pure law but whether the facts support the PCR court's finding that Petitioner's plea was freely and voluntarily made.

ARGUMENT

Probative evidence supports the PCR court's finding that Petitioner pled freely and voluntarily, in order to avoid the risk of life without parole, and the trial court merely explaining the consequences of a trial verdict that would result in life without parole and explaining what life without parole means does not render a plea involuntary.

Petitioner contends plea counsel and the plea court coerced Petitioner into pleading under Alford, focusing on Judge Young's advice to Petitioner he would die in prison if he was convicted by a jury. However, Judge Young's advice was correct and Petitioner admitted he chose to plead under Alford to avoid the possibility of avoiding life without parole. Petitioner pled to avoid the risks of an unfavorable trial verdict and this does not render a plea involuntary.

"[A] guilty plea should only be accepted where the record evidences an affirmative showing that it was intelligent and voluntary.'" Boykin v. Alabama, 395 U.S. 238, 242 (1969) (internal quotation omitted); "[W]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970).

"[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." North Carolina v. Alford, 400 U.S. 25 (1970). Indeed, "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Id. The Supreme Court in Alford noted:

> That [the defendant] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

Id. at 30.

"A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial." Wolfe v. State, 326 S.C.158, 485 S.E.2d 367 (1997); accord Hill v. Lockhart, 474 U.S. 52 (1985); Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). Note in the instant case, Petitioner never alleges he was misadvised by counsel.

In Whetsell v. State, 276 S.C. 295, 298, 277 S.E.2d 891, 892-93 (1981), this Court quoted a United States Supreme Court case that observed:

> [T]he decision to plead guilty before the evidence is in frequently involves making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . . .

(quoting McMann v. Richardson, 397 U.S. 759, 769-70 (1970)) (quotations and citations omitted). For Petitioner, pleading may have been a difficult decision. But that does not mean his plea was involuntary.

In Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992), the murder defendant complained his plea was coerced because plea counsel told him he could get the death penalty. Plea counsel testified that due to a confession, a murder conviction was likely. Plea counsel also admitted he discussed the possibility of the prosecution seeking the death penalty after conviction, although plea counsel did not believe the facts warranted the death penalty. In concluding the plea was voluntarily made, the Court observed "the record evinces overwhelming evidence of petitioner's guilt, and that he pled guilty with the view of evading the possible death sentence." Id. at 12, 425 S.E.2d at 27.

Probative evidence supports that, similar to Wicker, Petitioner pled under Alford to avoid a life without parole sentence, which was a distinct possibility regardless of Petitioner's confidence in his case. As in Wicker, this was a proper reason to plead and does not represent an involuntary plea.

Further, the plea court's colloquy with Petitioner was not coercive but represents a thorough explanation of the consequences of either accepting or rejecting the plea offer. Significantly the plea court advised, "I'm not trying to convince you. It's not my job to convince you, but it is my job to make sure that you understand what the deal is, and I have explained what the deal is to you." The plea court again reiterated to Petitioner that he was the only person who could make the decision as to whether to accept the plea or proceed to trial. The plea court then explained to Petitioner the possibility for entering an Alford plea and allowed Petitioner to recess to speak with his attorney about pursuing that option.

Petitioner's reliance on Harden v. State of South Carolina, 276 S.C. 249, 277 S.E.2d 692 (1981) is misplaced. The plea court did not participate in a bargaining process as contemplated in Harden. Instead, Judge Young offered the possibility of an Alford plea as a resolution to the case. Other than explaining how an Alford plea works, he left the advice on whether to take an Alford plea to Counsel and left it to Petitioner to let Judge Young know if Petitioner wanted to enter an Alford plea.

Petitioner boldly argues in his conclusion that his charges could have been dismissed but for counsel's lack of investigation and counsel did not advise Petitioner accordingly; however, neither of these issues are stated in Petitioner's issue statement and thus are not before this court. Petitioner relies on his testimony and his codefendants' testimony that the PCR court found lacked credibility. On the other hand, the PCR court found Shealy's testimony credible. Shealy's testimony established that both codefendants were implicating Petitioner at the time of trial regardless of their willingness to testify positively for Petitioner at the PCR hearing. Petitioner therefore finds himself arguing against the PCR court's factual findings to support his claim.

On the other hand, probative evidence supports the PCR court's determination that Petitioner pled freely and voluntarily to avoid life without parole. Judge Young's colloquy with Petitioner was appropriate to ensure Petitioner could make a knowing and intelligent choice as to whether he should go to trial or risk the extreme result of life without parole.

CONCLUSION

For the foregoing reasons, the PCR court's denial of relief was proper and the convictions and sentences should be affirmed.

Respectfully submitted,

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