RECEIVED

May 30 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Sumter County
Clifton Newman, Post-Conviction Relief Judge

Appellate Case No. 2022-001190

TRAVIS J. McFADDEN, SCDC # 357880,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

Petitioner's guilty pleas were not given voluntarily because trial counsel erred in not stating publicity on the record at the plea proceeding that the state agreed to a recommended twenty-year sentence to ensure that the plea judge, who sentenced petitioner to prison for forty-five years, was aware of the recommendation; and also counsel erred in advising petitioner that the plea judge would sentence him according to the state's sentence recommendation.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

The post-conviction relief court properly rejected Petitioner's assertions that his guilty pleas to the lesser-included offense of voluntary manslaughter and related charges were involuntary based on his assertions that he was unaware the plea court could exceed a recommendation from the State and that counsel failed to expressly inform the plea court of the recommendation because the uncontroverted evidence presented firmly establishes Petitioner was properly advised and understood that the plea court could sentence him to an aggregate term of fifty years of imprisonment and Petitioner entered knowing, voluntary, and intelligent guilty pleas with the advice of competent counsel who diligently represented him.

STATEMENT OF THE CASE

Petitioner Travis J. McFadden is presently confined within the South Carolina Department of Corrections. On December 26, 2011, Petitioner and six co-defendants entered a convenience store in Sumter County where they shot several people, including one victim who died from his injuries and one victim who was left paralyzed from his injuries. The Sumter County Grand Jury indicted Petitioner in a multi-count indictment for one count of murder, two counts of attempted murder, one count of armed robbery, one count of carjacking, one count of criminal conspiracy, and three counts of possession of a weapon during the commission of a violent crime in a multi-count, multi-defendant indictment (2012-GS-43-0781). Sharon B. Clark, Esquire, was appointed to represent Petitioner. Assistant Solicitor Edgar Donnald of the Third Circuit Solicitor's Office prosecuted the case.

Following plea negotiations with the State, Petitioner accepted a plea offer from the State requiring him to enter guilty pleas to the lesser-included offenses of voluntary manslaughter and strong-arm robbery and criminal conspiracy as indicted in exchange for the dismissal of all remaining counts and a recommendation from the State for a sentence of twenty years of imprisonment.

On November 18, 2013, Petitioner appeared before the Honorable W. Jeffrey Young, circuit court judge, and pled guilty to voluntary manslaughter, strong-arm robbery, and criminal conspiracy pursuant to the plea agreement. Following a thorough plea colloquy with Petitioner, Judge Young found Petitioner's pleas were knowingly, intelligently, and voluntarily entered and accepted Petitioner's pleas. Judge Young then sentenced Petitioner to thirty years' imprisonment for voluntary manslaughter, fifteen years' imprisonment for strong-arm robbery to be served consecutively to the sentence for voluntary manslaughter, and five years' imprisonment for

criminal conspiracy to be served concurrently to the other sentences, for an aggregate forty-five-year term of imprisonment.

On November 21, 2013, Petitioner filed a motion to reconsider his sentence. While this motion was pending, Petitioner prematurely filed a direct appeal, which the South Carolina Court of Appeals dismissed without prejudice. On December 16, 2016, Judge Young convened a hearing on the motion to reconsider the sentence. On February 8, 2017, Judge Young issued a written order denying the motion and reaffirming his sentence.

Petitioner then initiated a timely direct appeal and was represented by Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who originally filed a brief of appellant pursuant to Anders v. California, 386 U.S.738 (1967), along with a petition to be relieved as counsel. After a review pursuant to Anders, the Court of Appeals denied appellate counsel's petition to be relieved and ordered full briefing on the issue of whether a guilty plea can still be voluntary if the State does not disclose a sentencing recommendation to the plea court. Following briefing, the Court of Appeals affirmed his plea and sentences. State v Travis Jacqueese McFadden, Unpub. Op. No. 2020-UP-192 (Ct. Ap filed June 24, 2020). The remittitur was returned to the circuit court on July 20, 2020.

On June 1, 2021, Petitioner filed a *pro se* application for post-conviction relief, alleging he was being held in custody unlawfully based on the following grounds:

1. Ineffective Assistance of Counsel
   a. "Counsel failed to withdraw from plea"
2. Prosecutorial Misconduct
   a. "Solicitor stated that I didn't committed (sic) voluntary manslaughter"
3. Involuntary Guilty Plea
   a. "I had a recommendation plea for 20 years which I accept but I got 45 years instead."

As requested relief, Petitioner stated he was seeking "for voluntary manslaughter to be drop and a better sentence."

In response to the application, Respondent served a return and partial motion to dismiss, asking for a hearing to resolve Petitioner's claims of ineffective assistance of counsel and involuntary guilty plea, and moving for summary dismissal of Petitioner's claim of prosecutorial misconduct. An evidentiary hearing was convened before the Honorable Clifton Newman, circuit court judge, on June 28, 2022. Petitioner was present alongside counsel Falk. Testimony was taken from Petitioner, plea counsel Sharon B. Clark, and the prosecutor Edgar Donnald.

At the start of the hearing, Respondent renewed its motion to dismiss the prosecutorial misconduct allegation. After hearing argument from both parties, the court denied the motion and the matter proceeded forward on all raised claims. Petitioner, plea counsel Clark, and prosecutor Donnald all testified. At the conclusion of the hearing, the court denied the application and requested Respondent submit a proposed order of dismissal. The court subsequently issued a written order finding Petitioner failed to establish any constitutional violations or deprivations entitling him to relief and denying the application with prejudice pursuant to S.C. Code Ann. § 17-27-80. Petitioner then initiated this instant appeal.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly rejected Petitioner's assertions that his guilty pleas to the lesser-included offense of voluntary manslaughter and related charges were involuntary based on his assertions that he was unaware the plea court could exceed a recommendation from the State and that counsel failed to expressly inform the plea court of the recommendation because the uncontroverted evidence presented firmly establishes Petitioner was properly advised and understood that the plea court could sentence him to an aggregate term of fifty years of imprisonment and Petitioner entered knowing, voluntary, and intelligent guilty pleas with the advice of competent counsel who diligently represented him.

On appeal, Petitioner asserts the post-conviction relief court erred in rejecting his claim that his guilty plea was involuntarily entered because he did not have an adequate understanding of the sentence he could receive by entering his guilty plea and plea counsel failed to explicitly advise the plea court of the recommendation from the State regarding sentencing. In support of that contention, Petitioner asserts that due to plea counsel's misadvice, he had no understanding of the difference between a negotiated plea and a recommendation from the State as to sentencing and believed he would automatically receive a sentence of twenty years of imprisonment if he pled guilty. Petitioner also asserts plea counsel erroneously failed to explicitly inform the plea court of the recommendation as to sentencing, exacerbating Petitioner's misunderstanding as to the sentence he could receive as a result of his plea. However, the record from the plea and evidentiary hearing directly refutes this claim and the post-conviction relief court properly rejected this claim. These findings are not controlled by an error of law and are supported by the record. This Court should deny certiorari.

Petitioner asserts his guilty pleas were involuntarily entered due to ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

When reviewing a guilty plea, the analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Lee, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge

must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

The heart of Petitioner's claim is that his plea was involuntarily rendered due to plea counsel's performance. "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. Id. at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id. at 31.

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 court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty or the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, "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." Harres, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to

determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [Applicant] would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

Here, the records from the general sessions proceeding and the post-conviction relief proceeding unequivocally establish Petitioner entered a knowing, voluntary, and intelligent plea with the advice of competent counsel who thoroughly explained the State's plea offer, what a recommendation was, and that Petitioner could potentially receive a sentence in excess of the twenty-year term the State recommended pursuant to the plea agreement.

Initially, the plea transcript supports the post-conviction relief court's finding that Petitioner understood he could receive up to a fifty-year sentence as a result of the plea. The plea court reviewed the potential sentences for each offense with Petitioner and then explicitly asked Petitioner if he understood the sentence he could receive:

> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, do you understand that on the voluntary manslaughter charge, that I can sentence you up to 30 years in jail?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: And that is a violent, most serious offense, which means that you -- this would be one of your strikes, and that you will have to serve at least 85 percent of whatever I sentence you to?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that on the robbery – common law robbery, strong armed robbery, that I could sentence you to up to 15 years in jail?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you understand on the conspiracy charge, that I could sentence you up to five years in jail?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you understand that if I decide to run these consecutively, that I could sentence you to a total of 50 years; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, so you fully understand the charges against you and the consequences of your plea?
>
> THE DEFENDANT: Yes, sir.

(App. 10-11). The unambiguous record from the plea affirmatively establishes Petitioner knew he could receive consecutive sentences for an aggregate total of fifty years of imprisonment and that, with this understanding, he still wished to plead guilty.

Moreover, Counsel testified she explained the difference between a negotiation and a recommendation and that the plea court could sentence Petitioner to consecutive sentences for a maximum of fifty years of imprisonment. (App. 127-128, 136-137). Applicant similarly testified he understood he could receive consecutive sentences up to an aggregate fifty-year term of imprisonment as a result of his plea. (App. 117-119, 122-123).

The record from both the plea and the evidentiary hearing establish Petitioner was represented by competent counsel who was sufficiently prepared Petitioner's case and provided

reasonable and prudent advice to Petitioner regarding all aspects of his plea, including sentencing. The record clearly establishes Petitioner's plea was knowing, voluntary, and intelligent. Ample evidence supports these findings. The post-conviction relief court properly denied relief and this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

By: *s/Megan Harrigan Jameson*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

May 30, 2023