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**Jun 23 2023**

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM YORK COUNTY

Court of Common Pleas

The Honorable J. Mark Hayes, III, Circuit Court Judge

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Appellate Case No. 2022-001435

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CASSIE CUNNINGHAM

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF THE ISSUE

To set aside a presumptively-valid guilty plea based on ineffective assistance of counsel, a PCR applicant must show counsel's performance fell below an objective standard of reasonableness and this unprofessional conduct caused her to plead guilty unintelligently or involuntarily. In this felony DUI case with strong evidence of guilt, plea counsel presented substantial, well-considered mitigation evidence acknowledging Petitioner's history of substance abuse and prior DUI while requesting a lenient sentence aimed towards rehabilitation, and communicated his strategy to Cunningham. Cunningham did not seek to set aside her plea at the PCR hearing. Did the PCR court abuse its discretion by denying relief?

## STATEMENT OF THE CASE

In December 2014, Petitioner Cassie Cunningham pled guilty to felony DUI resulting in death. Cunningham was represented by James W. Boyd, Esquire ("Plea Counsel"). The Honorable Brian M. Gibbons, Circuit Court Judge, sentenced her to 23 years' incarceration and imposed a fine of \$15,000. Cunningham did not appeal her plea or sentence.

Cunningham filed an application for post-conviction relief on November 25, 2015, alleging, among other things, that plea counsel provided ineffective assistance of counsel in the course of his mitigation presentation during the plea hearing. An evidentiary hearing was convened on February 1, 2017, before the Honorable J. Mark Hayes, II, Circuit Court Judge. Cunningham and Plea Counsel testified at the hearing. Judge Hayes denied relief in an order filed May 11, 2017, finding Cunningham had not established deficiency or prejudice. (App.75). Cunningham did not appeal.

Cunningham filed a second PCR action on May 31, 2021. The State consented to a belated appeal from Judge Hayes's denial of relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). An order to that effect was signed on September 1, 2022, by the Honorable Edward W. Miller, Circuit Court Judge. Cunningham filed a petition for writ of certiorari on February 21, 2023. This return follows.

## STANDARD OF REVIEW

The appellate court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them, but will reverse if its decision is controlled by an error of law. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). A lower court's factual finding that a guilty plea was voluntarily and intelligently entered is binding upon the appellate court. Vickery v. State, 258 S.C. 33, 35, 186 S.E.2d 827, 827 (1972).

## ARGUMENT

### **I. The PCR court correctly denied relief because Cunningham failed to prove counsel was ineffective or that she would have proceeded to trial absent his alleged unprofessional conduct.**

Evidence supports the PCR court's finding that Cunningham failed to prove her attorney provided ineffective assistance at her plea hearing, or that she would have proceeded to trial absent his alleged unprofessional conduct. The transcript of the plea hearing demonstrates plea counsel presented a strong mitigation case in the face of an egregious fact pattern, and the evidence presented at the PCR evidentiary hearing supports the PCR court's finding that counsel provided effective assistance. At the PCR hearing, Cunningham did not seek to set aside her guilty plea, thus failing to establish prejudice. Certiorari should be denied.

#### Applicable law

To establish a claim of ineffective assistance of counsel, an applicant must show counsel's performance fell below objective standards of reasonableness under prevailing professional norms. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant is "required to overcome the presumption that counsel was effective in order to receive relief." Id. If an applicant is able to meet her burden of proving counsel was ineffective, she must further show that she was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

"In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). The longstanding test 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.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). “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) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). A PCR applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence. SCRCF 71.1. Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice “was within the range of competence demanded of attorneys in criminal cases.” Lockhart, 474 U.S. at 56.

“Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.” McMann v. Richardson, 397 U.S. 759, 770 (1970). “That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.” Id. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). A defendant is “bound by his plea

and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." McMann, 397 U.S. at 774.

The "guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. . . . These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." Blackledge v. Allison, 431 U.S. 63, 71 (1977). "More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult." Blackledge, 431 U.S. at 71–72. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge). A valid guilty plea "must be treated as final in the vast majority of cases." Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014).

Cunningham's allegations are insufficient to establish prejudice

The foregoing authority establishes that in order to establish prejudice from ineffective assistance of counsel in the context of a guilty plea, the applicant must show that counsel's alleged unprofessional conduct caused her to plead guilty where she would have otherwise insisted on going to trial. That is not the case here. At the PCR hearing, Cunningham stated that she was not seeking to set aside her

guilty plea. (App.116). Her presentation was focused on her belief that she received an unduly harsh sentence, but she admitted she was aware the PCR court could not re-sentence her. (App.116). Cunningham's testimony at the evidentiary hearing precludes a prejudice finding.

The absence of prejudice is further supported by the transcript of the plea hearing. Cunningham told the court she was pleading guilty voluntarily despite her awareness of the potential of a 25-year sentence. (App. 4–5). She told the court that she had discussed the case with her attorney and she was satisfied with his services. (App.5). She told the court she was aware of her trial rights and that she understood she was giving up those rights. (App.5–6).

The facts of this case were egregious. Cunningham killed Kristen Knight when she crashed into her car after driving at a speed of 107 miles per hour in a large SUV. (App.7–11). Cunningham had a blood-alcohol level of .239 two-and-a-half hours after the crash. (App.6). The solicitor informed the court that Cunningham had previously been convicted of DUI, had several times been ticketed for speeding, and had contributed to a car accident the previous year. (App.7–8). Knight was the mother of two small children, and at sentencing her widower asked the court to impose the maximum 25-year sentence. (App.14–15).

Plea Counsel testified that the case was never in a trial posture. He explained "it appeared there was no viable chance that she would have . . . a chance of having a not guilty verdict in trial based on all the factors of the case, so it became a situation of trying to get the best plea for you that was possible and

present the best mitigation possible." (App.119). The solicitor did not extend a plea offer to Cunningham. (App.119).

PCR counsel provided effective representation

Plea counsel investigated the case but was not able to find any holes in the State's case. (App.120). In response to this devastating fact pattern, plea counsel offered humanizing mitigation evidence, explaining Cunningham had been physically abused as a child and began using drugs and alcohol at a young age. (App.21, 120–21). Cunningham was also abused by her husband, and suffered from bipolar disorder and PTSD. (App.21). Plea Counsel described Cunningham's history of alcoholism and intermittent periods of sobriety. (App.21–23). He described her employment at a daycare and her recent romantic relationship that had a positive influence on her life. (App. 22). He further told the court Cunningham had been participating in AA and bible study while incarcerated. (App.24). Counsel told the court this mitigation evidence was not an excuse, but an explanation. (App.26).

Plea counsel presented expert testimony from a psychiatrist, Dr. Patrick Goldsmith, who detailed Cunningham's mental health and addiction struggles. (App.29). Goldsmith offered his opinion about the effects Cunningham's PTSD and history of abuse had on her conduct. (App.28–30). Goldsmith recommended psychiatric treatment and testified there were local resources available. (App.29–30). Plea counsel presented testimony from Cunningham's boyfriend, mother, brother, and stepfather concerning positive elements of Cunningham's personality

and improvements she was making, and asking for mercy on her behalf. (App.30–35).

The plea court stated his opinion that Cunningham was a "pretty decent person" who made a horrible mistake. (App.37). He emphasized that Knight's children would grow up without their mother, and described the accident as an "extreme situation." (App.39). He noted Cunningham's prior DUI conviction.

Cunningham claimed Plea Counsel did not properly "present the facts" of her prior DUI, which she explained resulted from her drinking liquor in a liquor store parking lot while under the influence of hydrocodone. (App.96). She testified that she decided to pull over because she was intoxicated, but her abusive husband insisted over the phone that she drive home. (App.98). She explained her belief that it would have been beneficial for the plea court to hear this information. (App.100). She admitted she was at fault in the death of Kristen Knight but explained she filed this PCR action because her "sentence was severe and out of proportion to what [she] had seen or heard or been told by [her] lawyer." (App.107). She disputed the psychiatrist's statement that she had attempted suicide eight times, and stated her belief that the psychiatrist was not beneficial to her case. (App.26–31). Plea Counsel testified he shared Dr. Goldsmith's findings with Cunningham, but did not recall the information about Cunningham's suicide attempts. (App.123).

The plea court stated his opinion that Cunningham was a "pretty decent person" who made a horrible mistake. (App.37). He emphasized that Knight's

children would grow up without their mother, and described the accident as an "extreme situation." (App.39). He noted Cunningham's prior DUI conviction.

Evidence supports the PCR court's finding that Cunningham failed to establish deficiency. Plea Counsel presented a substantial mitigation case centered on Cunningham's difficult life and her lengthy struggles with addiction and mental health issues. There was little more counsel could have done to mitigate the horrific facts of this case and Cunningham's culpability. Certiorari should be denied.


## CONCLUSION

Evidence supports the PCR court's finding that Cunningham failed to establish deficiency and prejudice. Plea Counsel presented a substantial, well-considered mitigation case and shared his strategy with Cunningham. There was little more counsel could have done to mitigate the horrific facts of this case and Cunningham's culpability. Likewise, Cunningham failed to establish prejudice. She candidly admitted her guilt, and stated she was not seeking to invalidate her plea. (App.116). While Cunningham expressed her dissatisfaction with the length of her sentence, she never claimed she would not have pled guilty but for counsel's alleged deficient representation. For all the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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