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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi. F. Curtis, Circuit Court Judge

Case No. 2018-CP-22-00712

Kneshon Pino, Appellant,

Vs.

State of South Carolina, Respondent,

NOTICE OF APPEAL

Kneshon Pino, Appellant, appeals trial court's Order of Dismissal, dated March 7, 2023, dismissing his application for PCR relief. The Order of Dismissal was filed May 26, 2023, and received by counsel for Appellant on or about June 3, 2023.

November 30, 2023

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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Kneshon Pino, # 303317, Applicant,	)	Case No.: 2018-CP-22-00712
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 6, 2018. Respondent made its return on January 7, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 9, 2022, at Georgetown County Courthouse. Thurmond Brooker, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Jerry Finney 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.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted in the June 2016 term of the Georgetown County Grand Jury for trafficking in heroin, second or subsequent offense (2016-GS-22-00589). Applicant later waived presentment of an indictment for unlawful possession of a sawed-off rifle or shotgun (2017-GS-22-00983).[1]

[1] Applicant was additionally charged or indicted for numerous other charges, as articulated on pages 11-12 of the plea transcript: three counts of distribution of heroin; three counts of

Jerry L. Finney, Esquire, represented Applicant, and Richard D. Todd, Jr., Esquire of the Fifteenth Circuit Solicitor's Office prosecuted the case. On September 18, 2017, Applicant waived presentment and pled guilty to possession of a sawed-off rifle, and additionally pled guilty to the lesser-included offense of trafficking in heroin, first offense. Accepting terms negotiated between Applicant and the State, the Honorable Thomas W. Cooper, Jr., circuit court judge, sentenced Applicant to concurrent sentences of fifteen years for trafficking and ten years for the sawed-off shotgun. Applicant did not appeal his plea or sentence.

Summary of Relevant Facts

On March 2, 2016, officers with the Fifteenth Circuit Drug Enforcement Unit observed Applicant engage in a hand to hand transaction with another wanted individual. They recognized Applicant from a previous purchase and had a warrant for his arrest. They arrested both Applicant and the other individual, who were in separate cars. When they arrested Applicant, they searched his vehicle. Inside his vehicle they found approximately six grams of heroin located in a bag. Applicant had two prior drug convictions. Applicant was arrested on March 2, 2016 for trafficking heroin, second or subsequent offense and released on bond. On August 17, 2017, agents with the Fifteenth Circuit Drug Enforcement Unit executed a search warrant on Applicant's residence. They also had an arrest warrant for him based on another series of drug transactions. When they arrested him and searched the premises, they found several stolen guns, including an N-4 rifle. The N-4 has a 12-and-a-half-inch barrel and is prohibited in this state. (Tr. 9-11).

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distribution of heroin near a school; four counts of felony possession of a firearm; possession of marijuana, second offense; two counts of possession of narcotics; and receiving stolen goods. These various charges were dismissed as part of the plea. (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 for the following reasons:

1. "Ineffective assistance of counsel"
   a. "Here, counsel for the Applicant was demonstrably ineffective by not informing the defendant of a possible defense available under the circumstances of his case."
      i. "[I]t takes only a single glance at the State's plea offer to determine it took advantage of the barrage (impermissibly stacked) of charges to persuade a unintelligent (in law) defendant that his best chances under the circumstances, are to plead guilty."
      ii. Applicant primarily cites to and argues Steadman v. State, 827 So. 2d 1022 (Fla. Dist. Ct. App. 2002).
      iii. "Thus, without counsel acting competently, realizing there was a viable mitigating argument at his disposal. Based on the rationale of 'sentence manipulation.' Where South Carolina does honor the defense of entrapment. There exist more than a possibility after looking at Pino's initial arrest and charge. He would have received a reduced charge from the trafficking conviction. But where the various charges were included. The court instead believed it was doing Applicant a favor. Thus, Counsel was ineffective for failing to present this mitigation sentence argument."
   b. "In addition, prior to advising a defendant to plead guilty, counsel should at minimum 'investigate the allegations for which the pending charges are base[d.]' In the instant case at bar; 'counsel was totally without the Rule 5 Discovery material from the Solicitor's Office in the more recent 2017 case(es).' Whereas, those case[s] were used by the Solicitor to impact Applicant's decision of whether to plead guilty or not."
2. "Unintelligent or invalid guilty plea"
   a. "In the instant case at bar. Pino's guilty plea and accompanying colloquy amounted to nothing more than a pro forma answers to pro forma questions. State v. Gardner, 570 S.E.2d 184, 187 (2002). The Judge in this case for one; "never informed Pino of the State's obligation to have obtained a 'true billed indictment' for each of the charges he faced.' Nor for that matter, 'does the record show counsel had an opportunity to negotiate the plea and sentence imposed.' Where counsel had totally failed to obtain the Rule 5 for many of the charges the State relied on to force the plea."
   b. "In other[ ]words, 'rather than negotiate with unindicted charges to bolster the State's plea bargaining position'. Counsel had at his disposal the constitution in regards to the subject-matter-jurisdiction, and the lack thereof. When cases have not been presented to the grand jury. Thus, without Pino being informed of this very important right, these rights'. His guilty plea is anything except knowing and intelligent."

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

1. Ineffective Assistance of Counsel
    a. Failure to discuss the investigative report with Applicant.
    b. Failure to move to suppress the evidence.
    c. Failure to review the elements of the weapons possession charge prior to the plea.
    d. Failure to obtain discovery concerning Applicant's second set of charges.
    e. Failure to seek bifurcated plea.
2. Invalid Plea.
    a. Applicant did not have the opportunity to review discovery from his second set of charges.
    b. Applicant did not know what the weapons charge elements were.
3. Denial of Counsel on Applicant's weapons defense.

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 testified that he plead guilty on September 18, 2017, to two charges. The first charge was trafficking heroin, first offense. Applicant testified he was arrested for a transaction between himself and Todd Blythe, who was under surveillance at that time. Applicant asserted that he intentionally approached and entered Blythe's vehicle for a short period of time before returning to his own car and encountering law enforcement officers.

Applicant testified that Jerry L. Finney, Esquire, was representing him on other criminal charges at the time and that he hired him to represent him on this charge as well. Applicant stated that he reviewed the discovery with Mr. Finney, but Applicant testified he never discussed the investigative report with Counsel. Applicant further stated that he did not discuss the possibility of a motion to suppress evidence with Counsel, even though he asked his attorney about it.

Applicant admitted that he had been charged with new criminal offenses a couple of

weeks before deciding to plead to the two charges relating to this PCR action (2016-GS-22-0589, 2017-GS-22-0983). Applicant testified that there was not a Rule 5 motion nor motion for a Brady violation for the second charge for possession of a sawed-off shot rifle. Applicant first testified that Counsel did not represent him on this weapons charge, but that he did advise him about entering a plea on the charge. Applicant then testified that Counsel did not go over discovery or the elements the State would have to prove, and was not advised by Counsel on that weapons charge. Applicant asserted that Counsel did not discuss a negotiated bifurcation plea with him for the two charges. Applicant admitted Counsel advised him to accept a global plea agreement that disposed of all of his pending charges and that he was advised on what a global plea agreement was at the time of pleading.

On cross-examination, Applicant stated he had two bench warrants and two arrest warrants. Applicant disputed the facts on the police report from the incident and did not recall the State stating facts on the record without his objection. Applicant admitted he was told that his choices were to accept the State's offer of a negotiated plea to the lesser offense, or to plead "straight up" without a recommendation from the State. Applicant recalled he knew there were mandatory minimum requirements if he decided to plead straight up and understood the charges to which he was pleading. Applicant stated knew he was waiving his rights to a jury trial and was waiving defenses. Applicant concluded his testimony by stating he understood the sentences to which he had agreed to plead.

Counsel Testimony

Counsel testified he discussed all of Applicant's information regarding his arrest and the circumstances surrounding it with him, as well as the critical importance of deciding whether to accept the plea, because he was facing a life sentence. Counsel testified that he obtained the

video footage of the incident, showed it to Applicant, and discussed it with him thoroughly. Counsel testified he reviewed all of Applicant's defenses to this situation. Counsel insisted that he did not believe a motion to suppress the illegal substances could have been successful. Counsel stated that he weighed all the options in this case, including both trying the case or accepting a plea deal. Counsel testified that Applicant made the decision to plead. Counsel testified that he was not the original lawyer on this matter, but that the Public Defender's Office represented Applicant during the ten-day period before the preliminary hearing. Counsel testified that he was in the room at the time Applicant testified. Counsel stated that he discussed with Applicant in depth the severity of the charges he was facing, and that Applicant was "well-known to law enforcement" and had numerous other drug charges pending against him. A conviction on any of these pending drug charges would be treated as his third offense.

Counsel stated that he did hear Applicant's recollection of events and explained all the possible defenses. Counsel attested that he was not Applicant's lawyer on the weapons charge but with the totality of the circumstances he thought the plea to be the option in Applicant's best interest. Counsel also knew that the State could have withdrawn the plea. Counsel testified that Applicant had to take the global plea offer or all the negotiations would implode.

Counsel stated he was certain the law enforcement knew who Applicant was before they pulled up to his vehicle. Counsel stated that this was further supported in discovery and there was a warrant for his arrest.

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 Georgetown County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records,

the plea transcript, and this 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. S*ee 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

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, 528 S.E.2d 418 (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 *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).

Applicant's plea was freely, knowingly, intelligently, and voluntarily entered. Applicant stated he understood he was pleading to a negotiated fifteen-year sentence to the lesser-included offense for trafficking heroin, first offense and to a concurrent negotiated ten-year sentence to unlawful possession of a sawed-off rifle. (Tr. 3). He agreed that all other charges would be dismissed as a part of the plea negotiations. (Tr. 3). He stated that Counsel advised him that the offenses were non-parolable, and that he was aware of the charges, the violent and serious distinctions associated, and his constitutional rights. (Tr. 3-4). He stated that he wanted to plead. (Tr. 4). He stated he knew the applicable sentencing ranges. (Tr. 4). He stated he understood he was waiving his rights to a jury trial, to remain silent, to assert a defense, and to call and confront witnesses. (Tr. 5-6). He agreed to waive presentment on the weapons' charge. (Tr. 6). He stated he was not promised anything to plead beyond the negotiations. (Tr. 7-8). He stated that no one forced or threatened him into pleading and that the plea was free and voluntary. (Tr. 8). He stated he was satisfied with Counsel, that Counsel did everything for him, they had enough time to talk, and that he understood their discussions. (Tr. 9). He was informed he had ten days to appeal. (Tr. 9). This Court finds the plea was freely, knowingly, intelligently, and voluntarily entered and cannot be withdrawn now.

Failure to Obtain and Review Discovery

Applicant claims Counsel was ineffective and the plea invalid because he did not obtain and review discovery. Counsel credibly testified that he discussed the discovery regarding the drug charge with him in detail. He stated he did not obtain the discovery on the weapons charge because he did not represent Applicant on that charge. He testified he explained this to

Applicant, and he also informed him that he could obtain the discovery himself if he chose. Counsel was not ineffective because he had no duty to show Applicant discovery regarding charges he was not representing him on. Further, Applicant elected to plead while knowing he was unaware of what the discovery consisted of. Thus, this Court finds that this allegation has no bearing on the validity of the plea. Accordingly, relief is denied on this ground.

Failure to Review Elements of Offense

Applicant claims Counsel was ineffective and the plea invalid because Counsel never reviewed the elements of the weapons charge with him. This is directly disputed by Counsel's credible testimony to the contrary. Further, this Court finds this allegation implausible on its face, given the simple wording of the charge itself. Accordingly, relief is denied on this ground.

Failure to Seek Bifurcated Plea

Applicant claims Counsel was ineffective for failing to seek a bifurcated plea. Counsel credibly testified that the State was only interested in a global plea offer and rejection of part of the negotiations would cause the plea to implode. Counsel credibly testified that the plea was still in Applicant's best interest. There has been no showing of whether this was an option or how it would have been favorable to Applicant. Thus, relief is denied on this ground.

Failure to Move to Suppress Evidence

Applicant claims Counsel was ineffective for failure to move to suppress the evidence. This defense was waived through entry of an otherwise valid plea. Applicant has failed to establish that he was unaware of this defense and would have proceeded to trial instead. Counsel credibly testified that he discussed all available defenses with Applicant and that the motion to suppress likely would be denied. Thus, relief is denied on this ground.

Failure to Discuss Investigative Report

Applicant claims Counsel was ineffective and the plea invalid because he allegedly failed to discuss the investigative report with him. Applicant failed to show what, if anything, in the report would have caused him to reject an otherwise highly favorable plea offer and to proceed to trial. Additionally, Counsel credibly testified he reviewed all the information, discovery, and potential defenses with Applicant concerning trafficking charge. Thus, relief is denied on this ground.

Denial of Counsel

Applicant claims he was subject to a complete denial of Counsel on the shotgun charge. Applicant knew he was not represented on this charge when he pled and failed to show what Counsel would have done that would have changed that decision. Applicant received a highly favorable plea offer and the charge in dispute did not cause him to serve any additional time. Further, hesitation on accepting the plea would have caused the plea offer to implode, which would have been unfavorable. Further, Counsel credibly testified that he discussed this charge with Applicant prior to the plea and then he represented Applicant at the plea hearing that covered both offenses. Further, Counsel made clear to the Court that he did not represent Applicant on all charges. Still, the plea was accepted as being freely, knowingly, voluntarily, and intelligently entered and this Court has no reason to dispute that conclusion. Thus, 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 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 7th day of March, 2023.

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina.