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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. 2019-CP-26-01664

William Howard Funderburke, Jr.,

Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

William Howard Funderburke, Jr., appeals the Order of Dismissal of the Honorable Kristi F. Curtis signed on March 21, 2023, and filed on May 30, 2023, dismissing his post-conviction relief application. Original Counsel for Appellant was James K. Falk, who recently passed away. Undersigned Counsel was assigned on July 3, 2023, solely for the purpose of filing this Notice of Appeal on Appellant's behalf in light of the extraordinary circumstances of prior counsel's death.

July 3, 2023.

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
William Howard Funderburke, Jr., Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2019-CP-26-01664 **ORDER OF DISMISSAL**

FILED
HORRY COUNTY
2023 MAY 30 P 3:31
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before this Court by way of Applicant's post-conviction relief application filed March 18, 2019. Respondent made its return on June 25, 2019, and amended on July 14, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 6, 2022, at the Horry County Courthouse. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel James D. Stanko, 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.

Procedural History

During its June 2018 term, the Horry County Grand Jury indicted Applicant for criminal solicitation of a minor (2018-GS-26-03814). Applicant was represented by James D. Stanko, Esquire. Assistant Solicitor C. Leigh Andrew, Esquire, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 11, 2018, Applicant appeared before the Honorable Benjamin H. Culbertson, circuit court judge, and entered an *Alford* plea as indicted without any negotiations or recommendations. Judge Culbertson sentenced Applicant to eight years, provided that upon the service of two years, the balance would be suspended with probation for five years.

Applicant did not pursue a direct appeal.

Summary of Relevant Facts

Applicant was married to the victim's mother.Bbetween the dates of August 8, 1999, and August 7, 2002, Applicant began sexually abusing the victim. (Tr. 10). The victim was between thirteen and sixteen years old. (Tr. 10). Applicant performed oral sex on the victim and digitally penetrated her vagina. (Tr. 10). Applicant made a post-Miranda statement where he admitted to offering to perform oral sex on the victim when she was fifteen years old. (Tr. 10).

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 in that:

1. "The plea agreement was accepted by Applicant 'without negotiations or recommendations.' The solicitor breeched this agreement by recommending jail time to judge."
    a. "The facts will be supported by the trial transcript."

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

1. Ineffective Assistance of Counsel.
    a. Failure to discuss a plausible trial defense with Applicant.
    b. Failure to pursue a polygraph test.
    c. Brevity of time in consultation.
    d. Failure to challenge video evidence.
    e. Failure to contact witnesses.
2. Invalid Plea.
    a. Applicant was afraid of receiving a harsher sentence if he proceeded to trial.
    b. Applicant did not know he would have to register as a sex offender.

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 his accuser was thirty-two years old when the offense was reported. He stated that he was appointed Counsel. He stated he wanted to proceed with a trial because the victim manufactured the story involving sexual conduct that occurred when she was a minor. He stated that he spent four days in jail and had eight meetings with Counsel. Applicant testified that he did not think Counsel wanted to proceed forward to trial but was willing to do whatever Applicant wanted him to do. Applicant stated Counsel advised him that if the case proceeded to trial, they would have to show the jury that the victim was lying. He stated they did not discuss getting a polygraph test done to exculpate him. Applicant testified that Counsel did not believe in polygraph tests. He stated that they did not discuss how they planned to prove the victim was lying and did not talk about trial until four days before the trial date.

Applicant stated that he decided to plead at his seventh meeting with Counsel, when Counsel informed him that the prosecutor was considering adding an additional criminal solicitation of a minor charge. Counsel played clips from his interrogation with arresting officers. Applicant stated that the statements were taken out of context. He stated that the comments made in the video were regarding actions he partook in at age seventeen but stated that he thought the jury would think it would be offered regarding actions he undertook with this victim. He stated he offered apologies to the victims because Counsel told him to. He stated that he did not intend for the apology to be an admission of guilty. He stated it happened when he was seventeen years old and that he did not have a defense to the crime. He stated that Counsel told him that pleading was in his best interest. He stated that he pled under *Alford* and understood that an *Alford* plea meant that he was not admitting guilt. He stated that he did not have a prior criminal record. He

stated that Counsel did not discuss with him the collateral consequences of the conviction or that he would have to register as a sex offender until the plea court informed him.

Applicant stated that he understood the relief available and consequences of proceeding forward in his PCR action. He stated he pled because Counsel told him he stood a stronger chance of getting probation if he pled. He stated that Counsel told him he had an over fifty-percent chance of receiving probation if he pled, but that he had a less than ten percent chance of winning a jury trial.

Applicant stated that he wanted Counsel to develop a defense strategy for trial. He stated he gave Counsel the names of three people to contact, and that those witnesses would have testified that the victim was not a truthful person. He stated he felt forced into pleading and coached into what to say at the plea. He stated he did not want to proceed forward to trial without a defense.

On cross-examination, Applicant stated that he pled because he thought he would lose at trial because Counsel did not adequately prepare. He stated he thought he would receive a much harsher sentence at trial if he did not plead. He stated he was afraid he would spend the rest of his life in prison. He stated he waived his rights at the plea and that he discussed his rights and charges with Counsel. He stated that he pled under *Alford*. He testified that he thought that the plea was the best solution, given the circumstances.

Counsel Testimony

Counsel testified that he had never tried a sexual assault case at the time he took on Applicant's case. He stated that he met with Applicant multiple times, where he played the videos provided by the police. He stated that the defense strategy was to attack the victim's truthfulness. He stated he did not recall Applicant ever giving him the names of people he could

call as witnesses, so the strategy boiled down to thorough cross-examinations of the State witnesses. He stated he did not recruit a private investigator, and he did not have any information or evidence that would be admissible under the rape shield statutes. He stated that there was no forensic evidence, but the case was the victim's word against Applicant's. He stated that a polygraph was brought up once during his conversations with Applicant but was never seriously considered. Counsel testified that Applicant wanted to testify if the case proceeded to trial. He stated that Applicant never admitted guilt. He stated that he talked to the prosecutor about a week before trial, where the prosecutor stated that Applicant could be re-indicted on a greater charge, based upon the post-Miranda interview. He stated that the most important part of the video was the fifty-one-minute mark where he said, "if it is illegal to offer oral sex to a sixteen-year-old, then I am guilty." He stated that based upon that statement, it was in Applicant's best interest to consider the plea offer. He stated he did not believe the jury would accept Applicant's explanation that his statement referred to behavior he engaged in prior to age eighteen. He stated he walked through the questions Applicant would be asked at the plea colloquy beforehand. He stated that Applicant wanted to know about an appeal. He stated that he thought Applicant would receive a more favorable sentence if he accepted responsibility.

On cross-examination, Counsel testified that the case was originally going to trial. He stated he prepared a defense and discussed it with Applicant many times. He stated the defense consisted of focusing on the delayed reporting, attacking the victim's credibility, and Applicant taking the stand. He stated that the trial would have been a close call and would have hinged on whether the jury believed Applicant or the victim. He stated he thought Applicant pled because he was afraid of receiving a harsher sentence at trial. He stated that the plea offer was favorable. He stated that Applicant understood the rights he was waiving, and that he told Applicant he

would have to register as a sex offender. The plea court informed him of this requirement as well.

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 Horry County Clerk of Court Records, the plea transcript, and the recording pertaining to this PCR action. 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

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 entered freely, knowingly, intelligently, and voluntarily. Applicant stated he understood he was entering an *Alford* plea and stated he understood the charge, his rights, and the consequences of his conviction. (Tr. 4). He stated he understood he was waiving his rights to trial, to call and confront witnesses, to remain silent, and to present a defense. (Tr. 8). He stated he understood he was required to register as a sex offender for life. (Tr. 8-9). He stated he understood the sentencing maximum and fine. (Tr. 8). He stated he was pleading voluntarily and was not made any promises or threats to induce the plea. (Tr. 9). He stated he was not on medication or drugs impacting his understanding of the plea colloquy. (Tr. 5). Thus, the plea colloquy supports this Court's finding that the plea was entered freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now. This conclusion is further substantiated by Counsel's credible testimony that Applicant pled because he was afraid of a harsher sentence at trial and that Applicant seemingly understood what he was doing by pleading. Accordingly, this Court finds the plea valid and denies Applicant's request that it be vacated.

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.

Sex Offender Registry

Applicant claims Counsel was ineffective for failure to tell him he would have to register as a sex offender. This is a collateral consequence of sentencing and any alleged failure to advise of this consequence does not constitute ineffective assistance of counsel. *See Williams v. State*, 378 S.C. 511, 662 S.E.2d 615(2008) (finding that sex offender registry is a collateral consequence that has no effect on the punishment range and is not intended to punish and, therefore, any alleged failure to advise on this ground is not ineffectiveness). Applicant cannot seek relief based upon this claim.

Additionally, Counsel credibly testified he advised Applicant he would have to register as a sex offender. Further, the Court informed Applicant he would have to register at the plea hearing. Accordingly, relief is denied on this ground.

Defense

Applicant claims Counsel was ineffective for failure to discuss a plausible trial defense with him. Applicant has failed to show what this defense would have consisted of or why it would have caused him to proceed to trial instead. Additionally, the right to assert a defense was waived with the entry of an otherwise valid plea. Accordingly, relief is denied on this ground.

Polygraph Test

Applicant claims Counsel was ineffective for failure to pursue a polygraph test. However,

Counsel credibly testified that that the discussion of a polygraph test was brought up one time and not discussed again. This was not a tenable line of defense, was waived by Applicant when he entered the plea, and no prejudice was established. Further, Applicant has failed to show that the test would have produced a favorable outcome or otherwise been exculpatory. Accordingly, relief is denied on this ground.

Brevity of Time

Applicant alleges that Counsel was ineffective for brevity of time spent in consultation. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant claims that Counsel did not speak with him about the case enough. Applicant has failed to show how this brevity of time spent in consultation impacted Counsel's representation of Applicant. There is also no indication that the results of the proceedings or the decision to plead would have been different had Counsel conferred with him more. Applicant has failed to establish ineffective assistance of counsel and this Court declines to grant relief accordingly.

Challenge Video Evidence

Applicant claims Counsel was ineffective for failure to challenge the video evidence. This defense was waived by entry of an otherwise valid plea. Accordingly, relief is denied on this ground.

Failure to Contact Witnesses

Applicant claims Counsel was ineffective in failing to contact the three witnesses that Applicant informed Counsel of. Counsel credibly testified he did not recall ever being informed of any witnesses in the case. Counsel is not deficient for failing to call witnesses he was not informed of. Additionally, Applicant has not met his burden of proof in proving prejudice. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). (To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence). Further, Applicant has failed to show why calling these witnesses would have caused him to proceed to trial instead. Accordingly, relief is denied.

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 IT IS SO ORDERED this 21st day of March, 2023.

Kristi Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina.