

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO ORANGEBURG COUNTY

Edgar W. Dickson, Trial Judge

Heath P. Taylor, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2023-000273

LANCE MILLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI**

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ISSUE PRESENTED

Petitioner's Issue

Trial counsels erred in advising and allowing petitioner to put forth a proffer to assist police in solving a murder case where the proffer placed petitioner at the scene of the murder and subsequently led to a murder indictment filed against petitioner; and where the submission of the proffer also placed petitioner at the crime scene of another separate criminal case (attempted armed robbery and attempted murder charges for which he previously denied guilt), because this legal representation constituted a breach of client confidentiality.

Respondent's Counterstatement of Issue

The PCR court properly found (1) plea counsel articulated a reasonable strategy in using Petitioner's proffer to garner favor with the prosecution and (2) it was Petitioner's decision to make the proffer because Petitioner wanted to help investigators solve the murder of Scott Brooks.

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a seventeen-year sentence. In November 2018, the Orangeburg County Grand Jury indicted Petitioner for murder (2018-GS-38-1768), attempted murder (2017-GS-38-761), and attempted armed robbery (2017-GS-38-760). The attempted murder and attempted armed robbery charges arose from an incident involving Eric Jamison, who alleged Petitioner shot at him during a drug deal. The murder charge arose from the fatal shooting of Scott Brooks in Brooks's home. Both incidents occurred on March 20, 2017.

On October 28, 2019, a pre-trial motion hearing convened before the Honorable Edgar W. Dickson. Ray Chandler and Blair Jennings, Esquires, represented Petitioner. Solicitor David Pascoe and Assistant Solicitor Catherine Mubarak represented the State. After testimony from Investigator Stuke during the pre-trial hearing, Petitioner pled guilty to voluntary manslaughter¹ and attempted armed robbery. On October 29, 2019, Judge Dickson sentenced Petitioner concurrently to seventeen years for each charge. Petitioner did not file a direct appeal.

On February 21, 2020, Petitioner filed an application for post-conviction relief (PCR). On January 24, 2023, an evidentiary hearing convened before the Honorable Heath P. Taylor. Tommy A. Thomas, Esquire, represented Petitioner. Assistant Attorney General Danielle E. Dixon represented Respondent. On February 17, 2023, Judge Taylor issued an order denying relief and dismissing Petitioner's application with prejudice.

¹ Petitioner pled to voluntary manslaughter as the lesser-included offense of murder pursuant to North Carolina v. Alford, 400 US 25, 91 S.Ct. 160, 27 L.E.2d 162 (1970).

Petitioner's Proffer

Petitioner was arrested on March 29, 2017, for the attempted murder and armed robbery of Jamison. (App. 9, 12). At that time police did not have a suspect for Brook's murder. On August 9, 2017, Petitioner and plea counsel, Ray Chandler, met with Solicitor Ashley Cornwell and Lieutenant Shumpert to proffer a statement. (App. 13-14). In Petitioner's proffer, Petitioner admitted to being present with Aaron Beach at the scene of Brooks's murder and Jamison's attempted murder. (App. 19-22). Petitioner also admitted to driving Beach's vehicle and meeting Jamison on March 20, 2017. (App. 20-22). Petitioner stated he and Beach went to Jamison's home twice that day to purchase drugs for Brooks; during the second drug deal, Beach wanted to rob Jamison and began shooting at him. (App. 19-22). Petitioner explained that Petitioner and Beach returned to Brooks's house, and Beach shot and killed Brooks. (App. 22-23). Petitioner stated he drove Beach away from Brooks's house and threw the gun in a lake the next day. (App. 23-25).

PCR Testimony

At the evidentiary hearing, Petitioner testified he retained Ray Chandler after he was released on bond for attempted murder and attempted armed robbery. (App. 139; 141-42). Blair Jennings, who worked with Chandler, took over his representation. Petitioner stated he met with counsel six to seven times, discussed "what happened," and reviewed some discovery. (App. 142). He testified Brooks had been his friend, and the investigation into that murder had stalled. (App. 144). Petitioner stated Jennings suggested he proffer a statement to police to aid in that investigation. (App. 143-44). Petitioner testified plea counsel promised he would not be charged with murder if he provided the proffer. (App. 145; 162). He stated after his proffer, Beach was charged with murder. Thereafter, Beach implicated Petitioner as the shooter, and Petitioner was charged with murder. (App. 147).

Chandler testified he was retained before Petitioner was arrested for murder and was with Petitioner when Petitioner provided the proffer. (App. 164-65). Chandler explained Jennings had previously worked with the solicitor's office, and they were trying to "get ahead of the game." (App. 164-65). Chandler stated Petitioner was not promised anything for the proffer, averring a promise would have been improper. Chandler testified Petitioner had a significant prior record, and a trial could have been "a trainwreck." He clarified it would have been difficult for Petitioner to testify at trial due to his prior record. Chandler did not recall telling Petitioner he would not be charged with murder if he provided the proffer. (App. 166).

Jennings testified he met with Petitioner several times, reviewed the State's evidence, explained the strength and weaknesses of the State's case, and explained what the State would have to prove. (App. 179-80). Jennings stated he also explained to Petitioner the constitutional rights Petitioner would waive and the sentences he faced—both at the plea and if convicted at trial. (App. 181-82). Jennings never had any concerns with whether Petitioner understood his conversations. (App. 182). Regarding the proffer, Jennings stated that under the terms of the proffer, it could not be used against Petitioner at trial. He testified the proffer was a worthwhile strategy at the time. (App. 186). Jennings testified he never relayed to Petitioner that Petitioner would not be charged with murder if he provided the proffer. (App. 189).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue 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 PCR court's factual findings and will uphold them if any probative evidence in the record supports 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. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR 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 PCR court properly found (1) plea counsel articulated a reasonable strategy by using Petitioner’s proffer to garner favor with the prosecution and (2) it was Petitioner’s decision to make the proffer because Petitioner wanted to help investigators solve the murder of Scott Brooks.

Petitioner asserts plea counsel was ineffective for suggesting that he submit a proffer. Petitioner also asserts the proffer placed him at the scene of both crimes, which only served to further implicate Petitioner as guilty in both cases. Finally, he contends that due to the negative impact of the proffer, plea counsel’s advice was unreasonable, prejudiced Petitioner, and constituted a breach of confidentiality. (Pet. 6). Initially, Petitioner’s claim related to breach of confidentiality is not preserved. Further, probative evidence supports the PCR court’s finding that counsel articulated a reasonable strategy in suggesting Petitioner make a proffer, and it was ultimately Petitioner’s decision to make the proffer. (App. 203). Thus, Petitioner did not meet his burden of showing counsel was ineffective.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must overcome this presumption and show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.” Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

In the context of a guilty plea, a petitioner must show a reasonable probability that but for counsel’s alleged errors, he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of

the truth of the charges, the right to contest the validity of a plea is usually foreclosed. 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.”). Statements made during a guilty plea should be considered conclusive unless a petitioner presents valid reasons why he should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007). To be knowing and voluntary, a petitioner must be aware of the consequences of his plea, including the constitutional rights he is waiving and the sentence he faces. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

A. Petitioner’s argument regarding a breach of confidentiality was not raised to the PCR court and is not preserved.

Petitioner failed to raise an allegation before the PCR court that plea counsel breached confidentiality through arranging or attending the proffer. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Here, Petitioner alleged at the PCR hearing that plea counsel was ineffective for suggesting Petitioner submit a proffer to the State after being charged with attempted murder and attempted armed robbery. At no point during the hearing or in his application did Petitioner allege counsel breached confidentiality. Because Petitioner failed to raise this argument at any time to the PCR court, the issue is not preserved.²

² On the merits, nothing in the appendix supports plea counsel revealed any confidential information. Without more, Petitioner has failed to meet his burden.

B. Plea counsel was not deficient because they articulated a valid trial strategy, and Petitioner voluntarily proffered a statement to the State.

The PCR court correctly determined that plea counsel articulated a valid strategy when advising Petitioner to submit a proffer to the State. Critically, it is important to evaluate counsel’s decision *at the time the decision was made*—not in hindsight. See Strickland, 466 U.S. at 689 (“Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. **A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.**” (internal citation omitted) (emphasis added)).

When submitting a proffer to the State, trial counsel will not be deficient if they articulate a valid strategy for advising a defendant to submit a proffer. See Wills v. State, 437 S.C. 385, 437 S.E.2d 330 (Ct. App. 2022). In Wills, trial counsel advised Petitioner to accept a proffer agreement from the State because counsel believed the case would end against Petitioner if he was truthful during the proffer. Id. at 391, 437 S.E.2d at 333. Petitioner submitted a proffer but failed a polygraph test that was part of the proffer agreement, resulting in the State considering the agreement null and void and Petitioner being convicted at trial. Id. at 390, 437 S.E.2d at 332. At the PCR hearing, counsel testified he advised Petitioner to accept the proffer agreement to mitigate his pending charges and prevent the State from bringing additional charges. Id. at 395, 437 S.E.2d at 335. Counsel further testified he might have advised Petitioner differently in hindsight but believed the proffer agreement was the best option at the time “because he was convinced

Petitioner had been truthful.” Id. The Court of Appeals determined trial counsel was not deficient because he had articulated a valid strategy in advising Petitioner; and therefore, did not provide Petitioner ineffective assistance. Id.

In the present case, the PCR court correctly determined plea counsel articulated a valid strategy in advising Petitioner to submit a proffer to law enforcement. At the PCR hearing, Chandler testified that Petitioner was initially arrested for the armed robbery and attempted murder of Jamison. (App. 169). Chandler believed Petitioner was going to be indicted for Brooks’s murder and wanted to “get ahead of the game” by proffering. Chandler averred that if Petitioner made a proffer, he would be “in a much better position in case we had a trial.” (App. 164). Plea counsel believed that if Petitioner proffered to the State, Petitioner would hopefully become a State witness, implicate Beach in the charges related to Jamison, and “connect[] the dots” to Brooks’s murder. (App. 185). Plea counsel understood that the statements made during the proffer could not be used against Petitioner in court, as long as Petitioner remained truthful. (App. 186). Plea counsel thought the proffer was a “worthwhile strategy” and spoke to Petitioner about it. (App. 186-87). Chandler and Jennings each testified they did not represent to Petitioner at any point that the proffer would prevent Petitioner from being charged with Brooks’s murder. (App. 166; 189). Based on the foregoing testimony—which the PCR court found credible—counsel’s decision-making and advice regarding the proffer was reasonable under prevailing professional norms. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 (providing great deference should be given to the trial court “[w]here matters of credibility are involved”).

Additionally, probative evidence supports the PCR court’s finding that it was ultimately Petitioner’s decision to make the proffer. Petitioner testified Brooks was his friend and he “didn’t want the killer to go loose.” (App. 144). Petitioner also testified that after speaking with plea

counsel, he believed submitting a proffer was the best decision at that point in time. (App. 153). A fair view of the testimony shows Petitioner *wanted* to make the proffer to aid investigators in solving Beach's murder. There is no evidence showing Petitioner had previously told plea counsel something other than what he told investigators during the proffer. In fact, Petitioner's testimony at the PCR hearing was consistent with his proffer to law enforcement. (App. 203). Thus, Petitioner has failed to show that plea counsel did not articulate a valid strategy by advising Petitioner to proffer. Because plea counsel sought to garner favor with the prosecution and Petitioner wanted to help solve Brooks's murder, plea counsel's advice regarding the proffer was reasonable under prevailing professional norms and not deficient.

C. Petitioner has failed to show prejudice because he has not shown that but for the alleged deficiency, he would have proceeded to trial.

Petitioner alleges he was prejudiced by plea counsel's deficiency because Petitioner's proffer strategy failed and led him to be charged with murder. Petitioner also believes this led him to plead guilty, despite Petitioner's desire to not plead guilty in either case. (Pet. 4-5).

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). Surmounting Strickland's high bar is not easy, and the societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. ___, 137 S. Ct. at 1967.

Here, Petitioner has not shown that there was a reasonable probability that but for plea counsel's advice to proffer, Petitioner would have proceeded to trial. Petitioner acknowledged that

when he was first arrested, he was charged with the armed robbery and attempted murder of Jamison. Petitioner was charged with Brooks's murder about six months later. (App. 141). Petitioner understood that if he was convicted at trial, he could possibly face a maximum sentence of life plus fifty year's imprisonment. (App. 158). Additionally, under the terms of the proffer, the proffer could not be used against Petitioner if he proceeded to trial. (App. 186). Because of this, Petitioner's proffer did not make it more likely that Petitioner would be convicted of those charges.

Moreover, Petitioner freely and voluntarily decided to take a plea deal. He was aware of the possible sentences he faced at trial and accepted a plea deal for seventeen year's imprisonment. (App. 139; 158). Petitioner testified that he had spoken to plea counsel about the possibility of entering an Alford plea. (App. 150-51). Petitioner acknowledged that he spoke to his attorneys about the rights he was foregoing by pleading guilty, including the right to a jury trial, and no one had promised Petitioner anything in exchange for his plea. (App. 160-161). Petitioner averred his plea was a mistake because "[Beach] got 5 years probation, and [Petitioner] got 17 when it should have been the other way around." (App. 151). Petitioner's hindsight belief that he made a mistake does not defeat the fact that he freely, voluntarily, and knowingly pled guilty. Given the evidence the State had against Petitioner, Petitioner's willingness to enter a plea deal, and the sentence Petitioner received because of his plea deal, Petitioner has not demonstrated a reasonable probability that he would have proceeded to trial. Therefore, Petitioner has failed to show prejudice.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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This 29th day of December, 2023