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Jan 25 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable G.D. Morgan, Circuit Court Judge

Appellate Case No. 2023-000538

ERIC HARPER, Petitioner,

v.

THE STATE, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUE ON CERTIORARI 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 5

ARGUMENT 6

Harper failed to show deficiency or prejudice in counsel's decision not to present mitigation evidence about his borderline intellectual functioning at his guilty plea 6

CONCLUSION 14

STATEMENT OF ISSUE ON CERTIORARI

Whether the PCR court abused its discretion by refusing to grant Harper a new sentencing hearing based on counsel's failure to present his borderline intellectual functioning as mitigation at his guilty plea when Harper was sentenced within the statutory range.

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Petitioner Eric Harper for armed robbery, assaulting a police officer while resisting arrest, possession of a weapon during the commission of a violent crime, third degree burglary, second degree burglary (violent), petit larceny, and shoplifting.

The indictments stemmed from three separate incidents. The armed robbery occurred at an ATM at the BB&T bank in Spartanburg on August 6, 2017. App. 23–24, 136. Harper robbed the victim with a BB pistol. App. 136. The assault on a police officer occurred as Harper fled the scene. App. 5. Harper fought the officer attempting to arrest him. App. 25. The officer explained he did not know Harper was armed with only a BB gun and he believed he was in a life-or-death situation. App. 31–32. The officer decided not to use deadly force because the struggle occurred in an area where there were many bystanders. The shoplifting occurred on July 21, 2017, at a pawn shop in Spartanburg. App. 21. Harper burglarized the same pawn shop on July 23 and 26. App. 6–8, 22.

The State and defense negotiated a plea to third degree burglary on both counts, so Harper was facing up to five years' incarceration on each. App. 10. Armed robbery carries a maximum sentence of 30 years in prison. Harper was represented by Thomas A.M. Boggs, Esquire. Harper pleaded guilty on April 25, 2018, before the Honorable J. Derham Cole, Circuit Court Judge. The plea court engaged Harper in lengthy colloquy explaining his right to a jury trial. Harper was sentenced to 30 years' incarceration for armed robbery, suspended upon service of

15 years' incarceration and probation. App. 36. He was given a ten-year suspended probationary sentence for assaulting a police officer, to be served consecutively. He was sentenced to five years for each burglary and 30 days for each remaining offense, to be served concurrently.

Harper appealed, but the appeal was dismissed for failure to provide the explanation required under Rule 203, SCACR, for appeals from guilty pleas. App. 81. He filed an application for post-conviction relief on April 2, 2019. The State filed a return on May 18, 2019. An evidentiary hearing was convened on April 21, 2022, before the Honorable G.D. Morgan, Circuit Court Judge. Susannah Ross, Esquire, represented Harper. Chelsey Marto, Esquire, represented the State.

Harper testified on his own behalf. He testified he did not understand the plea process and did not understand he had the right to a jury trial. App.90–91. He admitted on cross-examination he pleaded guilty hoping he would receive a more lenient sentence than if he was convicted at trial. App. 94. He admitted he did not tell his attorney about any mental health issues. App. 94.

PCR counsel offered records documenting psychiatric treatment Harper received in prison. App. 129–35. The doctor's notes indicate Harper functions at a borderline intellectual level and suffers from depression. App. 129, 133. Harper did not present any testimony from a doctor or medical records from before his incarceration. Harper's father testified Harper is "slow" and complained the public defender's office did not communicate with him or notify him about his son's guilty plea. Trial counsel was deceased at the time of the evidentiary hearing. App. 81.

The State offered the testimony of the prosecutor, Spencer Smith, Esquire. Smith explained counsel told him Harper was not the "brightest bulb," but expressed no concerns about his competency. App. 121.

The PCR court denied relief on Harper's claims in a written order on March 14, 2023. (App.153). Harper filed a petition for writ of certiorari on March 8, 2023. This return follows.

STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id. The appellate court can affirm on any ground appearing in the record. Rule 220(c), SCACR.

ARGUMENT

Harper failed to show deficiency or prejudice in counsel's decision not to present mitigation evidence about his borderline intellectual functioning at his guilty plea.

The PCR court correctly denied relief because Harper failed to show a substantial likelihood of a different result had plea counsel presented evidence of his borderline intellectual functioning as mitigation at his guilty plea. Harper fails to allege he would have proceeded to trial but for counsel's alleged deficient performance, which is the traditional standard for proving prejudice in a guilty plea context. Rather, he seeks only a new sentencing hearing, relief which neither the United States Supreme Court nor this Court has granted in this context. Even assuming his claim is cognizable, he failed to show deficiency or prejudice. Certiorari should be denied.

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The purpose of the guarantee is to ensure the accused has a fair trial. Id. To prevail on a claim of "actual ineffectiveness," an applicant for post-conviction relief must show counsel's conduct fell below an objective standard of reasonableness based on the range of competence required in criminal cases. Id. at 688. He must further show that, but for counsel's unprofessional errors, there is a reasonable likelihood the result of the proceeding would have been different, i.e. prejudice. Id. at 696. The likelihood of a different result must be substantial, not just conceivable. Harrington v. Richter, 562 U.S. 86, 112 (2011).

In the context of guilty pleas, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Taylor v. State, 404 S.C. 350, 360 (2013). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Id. (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). 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. Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018). Guilty pleas must be treated as final in the vast majority of cases. Id.

As to deficiency, the record supports the PCR court's finding Harper failed to show counsel provided ineffective assistance. Harper did not offer any medical testimony at the PCR hearing. He relied on the medical reports from SCDC stating he has borderline intellectual functioning and the testimony of his father. Harper's father testified he had extensive documentation of Harper's medical history showing he had "lower intellectual functioning," but the records were not introduced at the evidentiary hearing. App. 98. Harper's father testified he was "slow." App. 101. At the plea hearing, Harper had no trouble communicating with the court and the court did not express concern about his ability to understand. Harper

repeatedly told the court he understood its questions and that his decision to plead guilty was knowing and voluntary. App. 9–22, 35.

Plea counsel[1] was deceased by the time of the evidentiary hearing, but the law presumes he provided competent representation. Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case."). Plea counsel was not present to explain his decisions, but it is still Harper's burden to show he took actions "no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that no competent lawyer would have chosen.").

Counsel could reasonably have concluded that presenting intellectual disability evidence would not be an effective mitigation strategy. See Id. at 2411 (explaining counsel could have reasonably concluded jury was "unlikely to be persuaded by a claim of intellectual disability" where "records suggested that his intelligence was below average, [but] they also indicated that he was not intellectually disabled."). The prosecutor testified plea counsel told him Harper was not the "brightest bulb, but never anything about getting his mental health

[1] Harper was represented by another lawyer in the public defender's office who would have served as his "trial attorney." App. 111. This attorney was not called as a witness at the evidentiary hearing.

evaluated." App. 121. He noted Harper had prior history with the court system as a juvenile. App. 121.

It is also possible counsel simply did not have enough credible information concerning Harper's intellectual capacity to make it a focus of his presentation, particularly if Harper did not present as disabled. Harper admitted at the evidentiary hearing he did not tell his lawyer about any mental health issues. App. 94. Even assuming Harper functions intellectually at a low level, he did not prove counsel acted unreasonably in failing to make this a focus of his mitigation presentation.

Likewise, Harper failed to show prejudice. Harper argues counsel's alleged failure to present intellectual disability mitigation resulted in him ending up with a more severe sentence than if counsel would have presented such evidence. But Harper has not cited any case establishing this as a valid claim of relief in PCR cases in a guilty plea context. The proper standard is whether the result of the proceeding would have been different—i.e. whether the defendant would have proceeded to trial rather than plead guilty—not whether a defendant would have received a more lenient sentence had more mitigation been presented. See Hill, 474 U.S. at 60 (holding petitioner failed as a matter of law to show prejudice because he "did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial"). Harper's assertion that he was prejudiced by counsel's performance is

unaccompanied by any claim that counsel's failure to present mitigation evidence caused him to plead guilty when he otherwise would have proceeded to trial.

The cases cited by Harper addressing failure to present mitigation are capital cases, where counsel's failure to present mitigating evidence can affect the result of that particular proceeding—the choice whether or not to impose the death penalty at the sentencing portion of a death penalty trial.[2] See Wiggins v. Smith, 539 U.S. 510 (2003); Andrus v. Texas, 140 S.Ct. 1875 (2020); Porter v. McCollum, 558 U.S. 30 (2009); Gray v. Banker, 529 F.3d 220 (4th Cir. 2008); Tennard v. Dretke, 542 U.S. 274 (2004); Penry v. Lynaugh, 492 U.S. 302 (1989). These cases are a class of their own. See Strickland, 466 U.S. at 686 (explaining an ordinary sentencing proceeding differs from capital sentencing phase in that it "may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance."). In death penalty cases, there is a distinct proceeding with its own formal procedure entirely dedicated to mitigation, ending with a binary verdict of death or mercy.

The possibility of a more lenient sentence based on additional mitigation evidence in the context of an ordinary plea hearing is not a different "result" within the meaning of Strickland. See Garren, 423 S.C. at 9, 813 S.E.2d at 708 ("While it is manifest the focus of Garren's PCR is the length of his sentence, he may not challenge a lawful sentence merely because he was hoping for a more lenient one.").

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[2] McKnight's reference to "mitigation evidence" was in the context of evidence mitigating guilt in a trial setting, not mitigation at a sentencing hearing. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

The United States Supreme Court has never applied Strickland in this situation, and Harper cites no case where a court did so.

Harper thus fails to allege the type of prejudice which could entitle him to relief, and the record refutes that any such prejudice exists. The armed robbery and assaulting a police officer cases in particular were very strong; Harper was caught fleeing the scene of the robbery and fought a police officer trying to arrest him. He had little choice but to plead guilty, and he received the benefit of concurrent sentencing by pleading to each charge at the same time. Harper does not allege he was not competent to stand trial, so there is no question he was capable of pleading guilty.

Even assuming Harper's claim is cognizable, he failed to show a reasonable probability he would have received a more lenient sentence had counsel presented mitigation related to his borderline intellectual functioning. Harper pleaded guilty to four serious crimes and several other property crimes at once. He put innocent lives in danger by attacking a police officer while armed with a BB pistol the officer believed to be a real weapon. He did not present significant medical evidence about his intellectual capacity at the time of the crime or testimony from the plea judge showing such evidence would have made a difference. Thus his argument that evidence of his borderline intellectual functioning would have influenced the plea judge to impose a more lenient sentence is speculative. Speculation cannot establish Strickland prejudice. Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995).

This case shows the impracticability of PCR claims based only on the length of sentence where the applicant does not allege counsel's actions caused him to plead guilty rather than proceed to trial. Claims of this nature are not based on a binary choice, such as the decision whether or not to impose the death penalty. See Andrus, 140 S. Ct. at 1885–86 (assessing whether jury "would have made a different judgment about whether Andrus deserved the death penalty as opposed to a lesser sentence"). Rather, Harper asks this Court to grant him a resentencing hearing based on the possibility that he could have received an undefined more lenient sentence within a wide range of permissible sentences.

This argument has no support in this Court's precedents. In order to show prejudice, Harper must show the plea court abused its discretion by imposing the sentence it imposed in this case. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 370 (1997) (in context of plea counsel's failure to move for continuance, applicant was required to demonstrate the trial court "would have abused its discretion in refusing to grant a continuance motion"). This is almost impossible when an applicant challenges a lawful sentence. Sentencing courts are vested with nearly unlimited discretion in sentencing, and sentences within the statutory range are virtually unchallengeable on appeal. See State v. Dozier, 263 S.C. 267, 271, 210 S.E.2d 225, 226 (1974) ("This Court has repeatedly held that it has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by statute. . . . the length of a prison sentence rests in the sound

discretion of the trial court, in absence of partiality, prejudice, oppression or corrupt motive.") (citing State v. Johnson, 159 S.C. 165, 156 S.E.2d 353 (1930)).

These principles counsel for double deference in a PCR context, where the PCR court is asked to review the plea court's exercise of extremely broad discretion. See Strickland, 466 U.S. at 686 (explaining ordinary sentencing proceeding "may involve informal proceedings and standardless discretion in the sentencer"). Ineffective assistance claims of this sort could be made in every case; an applicant can always argue counsel should have done more to present effective mitigation which could conceivably have resulted in a marginally more lenient sentence. This could explain why the United States Supreme Court has not recognized this type of IAC claim. But even assuming such a claim may be cognizable, Harper has not made the sort of extraordinary showing which would justify the relief he seeks.

The PCR court correctly denied relief. The petition should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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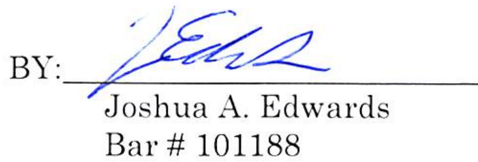
BY: 
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