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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Darlington County
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2021-001155

CEPHAS COWICK.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

BRIEF OF RESPONDENT

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STATEMENTS OF THE ISSUE

Petitioner's Statement of Issue

- I. Whether the PCR Court erred in dismissing Petitioner's PCR application upon the finding that the ineffective assistance of counsel claims raised therein fall under the scope of the plea agreement waiver.
- II. Whether the PCR Court erred in dismissing Petitioner's PCR application upon the finding Petitioner did not receive constitutionally defective advice concerning the plea agreement or waiver when the PCR Court failed to apply the proper standard and the record fails to establish a knowing and voluntary waiver.

Respondent's Counterstatement of the Issue

Did the post-conviction relief court properly dismiss this PCR action based upon Petitioner's valid waiver of his right to pursue post-conviction relief?

STATEMENT OF THE CASE

In October 2016, a Darlington County grand jury indicted Petitioner Cephas Cowick for two counts of murder (2016-GS-16-01433 and -01434), criminal conspiracy (2016-GS-16-01435), armed robbery (2016-GS-16-01436), first degree burglary (2016-GS-16-01437), grand larceny (2016-GS-16-01438), and possession of a weapon during the commission of a violent crime (2016-GS-16-01439), and third-degree arson (2016-GS-16-01440). Petitioner was represented by Emily Kuchar and William McGuire, Esquires (hereafter “Counsel”). Deputy Solicitor Kernard Redmond, Esquire, from the Fourth Circuit Solicitor’s Office, represented the State. On June 24, 2020, Petitioner pled guilty as indicted before the Honorable Eugene C. Griffith, Jr., circuit court judge. The plea took place through the virtual WebEx platform. In accordance with the negotiations with the State, Judge Griffith sentenced Petitioner to life without possibility of parole for the murder charges, thirty years’ imprisonment for armed robbery and first-degree burglary, fifteen years’ imprisonment for third-degree arson, ten years’ imprisonment for criminal conspiracy, and five years’ imprisonment for grand larceny. The weapons possession charge was dismissed because Petitioner was sentenced to life.

As a part of the plea negotiations, Petitioner agreed to waive all appeals and PCR actions regarding issues known to him at the time of the PCR hearing. (App.125). While letters memorializing the plea negotiations specifically stated Petitioner was waiving his “right to appeal this sentence or seek PCR or habeas relief,” at the plea hearing counsel stated Cowick was waiving claims “unrelated to ineffective assistance” but that he believed it “would be unethical for us to counsel him to waive claims against us. So any known claims with regard to anything in his case that he knows about is waiving, but not specifically ineffective. We’re not able to encourage him to do that.” (App.126). Petitioner did not appeal his plea or sentence.

Petitioner timely filed a PCR application on March 11, 2021. Respondent filed a return and partial motion to dismiss on July 11, 2021, amended July 29, 2021. The hearing on the State's motion to dismiss occurred on August 24, 2021, before the Honorable Michael G. Nettles, virtually via WebEx. William G. Yarborough, III, and Lauren C. Hobbis, Esquires represented Petitioner. William H. Ray, Esquire of the South Carolina Attorney General's Office represented Respondent. The Court dismissed the application in a written order based on Petitioner's knowing and voluntary waiver of the right to seek collateral actions involving issues known to him at the time of the plea. This appeal follows.

STATEMENT OF FACTS

On July 17, 2016, at approximately 6:20 in the morning, Petitioner and his wife, Katherine Cowick, were captured on surveillance footage outside a convenient store in a Geo Tracker. (App. 110-11). The Geo Tracker, driven by Katherine, was picked up on the store's surveillance footage shortly after the initial sighting. (App. 115). The Geo Tracker left the store once more, before returning around 7:40 A.M. alongside a black Cadillac Escalade driven by Petitioner. (App. 115). During the approximate hour and a half between the first and final sightings, Petitioner was dropped off at Ms. Couplin's residence where he proceeded to shoot and kill Ms. Couplin and her nine-year-old granddaughter, De'Ziyah Chatman-Davis. (App. 113). Petitioner took pills, money, and a debit card from the home, before stealing her Escalade and returning to the convenient store with his wife. (App. 113-14).

Around 11:50 that morning, Denise Couplin's son awoke in the upstairs bedroom, walked downstairs, and found De'Ziyah's body. (App. 111). Byron then took his six-year-old niece to the neighbor's house to call 911 and other family members. (App. 111). When law enforcement arrived, they found Ms. Couplin's body near De'Ziyah's body. (App. 111). Law enforcement was immediately made aware of Petitioner's possible involvement through information provided by family members about harassing calls he made. (App. 111-12). Law enforcement found Ms. Couplin's Escalade burned and abandoned, a short distance from the crime scene. (App. 112).

That same day, Petitioner was picked up by law enforcement and interviewed, where he initially denied the charges. (App. 112). However, Petitioner ultimately confessed to being dropped off at Ms. Couplin's home, going into the residence, shooting Ms. Couplin and De'Ziyah twice, then leaving in Ms. Couplin's Escalade. (App. 113).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). A PCR court's factual findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Questions of law are reviewed de novo. *Id.*

ARGUMENT

The post-conviction relief court properly dismissed Petitioner's PCR application because Petitioner knowingly and voluntarily waived his right to collateral review in order to secure a plea deal where he would avoid the death penalty.

Petitioner argues the PCR court erred in dismissing his application because he did not waive ineffective assistance of counsel claims as a part of plea negotiations. The PCR court properly rejected this argument, finding Petitioner knowingly and intelligently waived his right to collateral attack. These findings are not controlled by an error of law and are supported by probative evidence in the record. This Court should affirm.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "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*, 466 U.S. at 686.

In the guilty plea context, the inquiry with respect to the counsel's alleged deficiency turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Hyman v. State*, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012). The prejudice prong focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Id.* "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 v. Allison*, 431 U.S. 63, 74 (1977)). A defendant's knowing and voluntary waiver of

statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871, 873 (2012).

Under South Carolina law, a defendant can choose to waive his right to collateral review of his conviction so long as the waiver is knowingly and voluntarily made. *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary); *see also Moore*. Plea agreements in general operate under contractual principles and are upheld when each party receives the benefit of the bargain. *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). While appellate and collateral waivers are enforceable, a defendant who has waived his appellate and collateral review is still entitled to proceed forward with a post-conviction relief action on the very narrow issue of challenging his attorney's conduct in advising him to enter the waiver. *Sanders v. State*, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015).

In this case, Petitioner chose to waive his right to collateral review to avoid the death penalty. At the plea hearing, Petitioner waived all appeals and PCRs. (App. 99). The solicitor made clear that Petitioner "would waive not just appeals, but any collateral attacks as well." (Amended App. 124-25). The plea court turned to Counsel:

[W]hat Solicitor Redmond also was asking was, you're agreeing by virtue of this negotiation to waive any rights to appeal. He also was suggesting to waive any collateral attacks and I'm understanding that must be post-conviction relief challenges. Counsel for Mr. Cowick, is that correct, is that correct, is that your understanding of what he's waiving also?

(App. 125).

Counsel Kuchar's response was "[w]e believe that we're able to waive post-conviction relief as to any issues that are now known to Mr. Cowick." (App. 125). Attorneys Scales and

McGuire stated that they did not believe they could ethically advise Petitioner to waive all claims of ineffective assistance of Counsel. *See Sanders*, 412 S.C at 616, 773 S.E.2d at 583 n.2 (expressing concern “with the ethical implications of a waiver of ineffective assistance of counsel claims”). After this discussion, Petitioner stated he understood what he was waiving and proceeded to waive all collateral attacks pertaining to “anything known” to him as of the date of the plea hearing. (App. 125-26). Petitioner advised the court that he was satisfied with his attorneys, that he understood their advice, and believed they provided him with good and fair advice. (App. 127-28). Petitioner stated that he had previously been treated for mental health disorders, but counsels confirmed that they had no concerns about Petitioner’s competency. (App. 122). Petitioner confirmed he did not take any prescribed or unprescribed medication, drugs or alcohol within twenty-four hours of the plea, that he felt clear-headed and good that day, and that he had enough to eat. (App. 122-23).

At the PCR hearing, the solicitor testified the plea process was initiated by Petitioner’s attorneys, who sent letters stating that Petitioner would waive his right to appeal and the ability to pursue all PCR and habeas actions. (App. 29). The solicitor testified it was his understanding that if Petitioner pursued a PCR action, the plea agreement would be void and he would be permitted to move to reopen the sentencing process. (App. 32). He testified that his understanding was that the waiver encompassed ineffective assistance of counsel claims, as far as the claims related to information that existed at the time of the plea. (App. 33).

The letters from counsel assured the solicitor that Petitioner “will further *waive any appeals of collateral relief* from his sentence. Under the proposed plea, Cephas’ sentence will be final. He will never be eligible for parole or any reduction in his sentence, and *he will die in*

prison.” (App. 96) (emphasis added). A second letter reiterated: “Cephas would *give up the right to appeal this sentence or seek PCR or habeas relief.*” (App. 97) (emphasis added).

Defense counsel agreed the letter “effectively represents the contents of the plea agreement.” (App. 42). He testified he spoke with Petitioner before sending the letters. (App.41). He also confirmed the state did not make any plea offers in this case.¹ (App.41). Petitioner agreed that as a part of his plea agreement he waived his right to pursue post-conviction relief. (App. 53).

This record establishes that Petitioner waived his right to pursue post-conviction relief. This decision was objectively reasonable, given that it permitted him to escape receiving the death penalty. *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (internal quotation marks omitted) (finding that a petitioner’s subjective finding or assertion is non-dispositive and to establish prejudice the petitioner must establish that going to trial would have been objectively reasonable, given the circumstances). There was no indication Petitioner’s history of mental health issues had any impact on his ability to understand the waiver. (App. 122–23).

Petitioner argues that because his attorneys could not explicitly advise him to waive all claims of ineffective assistance of counsel, those claims could not have been waived independently by him. This argument runs contrary to the negotiations themselves, as articulated in both the letters laying out the negotiations, as well as the plea hearing transcript. The terms of this agreement are clearly stated in the letters from defense counsel: to avoid the death penalty, Cowick agreed to waive his right to contest his plea via PCR. Understandably, the victims’ family did not believe a life sentence was justice for these egregious crimes, but the State agreed

¹ Two of Petitioner’s allegations are that counsel failed to relay plea offers. (App.4).

not to pursue death in part because of the guarantees by the defense that Cowick would die in jail. (App. 161–75).

The record shows Cowick was aware that his plea would be a final resolution to his case and he voluntarily chose to waive any future collateral attacks in order to secure a plea deal by which he would avoid the death penalty. (App. 46). Petitioner submitted a written affidavit where he admitted guilt and wrote he was “accepting responsibility for this crime and being punished accordingly.” (App. 182). He admitted he “broke into the Couplin residence at night with a gun with the intentions of robbing her,” where he “killed her and her granddaughter by shooting them both.” (App. 189). Petitioner waived his right to assert ineffective assistance of counsel allegations and should not be permitted to raise these claims now. He does not allege any after-discovered evidence, or anything that was not known or knowable to him before his plea.

Notably, Petitioner did not present evidence at the evidentiary hearing showing plea counsel provided ineffective assistance by advising him to waive his right to appeal and collateral attack. Rather, his argument below was focused on Petitioner’s understanding whether he was waiving his right to PCR review. (App. 21). The PCR court recognized the issue was “whether or not there was actually a waiver” of collateral review. (App. 24). PCR counsel did not question counsel in detail about his conversations with Petitioner regarding the waiver, only asking a handful of questions regarding Petitioner’s history of head injuries. (App. 46–47). Similarly, PCR counsel elicited almost no information from Petitioner about counsel’s advice regarding the waiver. (App.50–52). Thus Petitioner failed to establish any ground for relief under *Sanders*. See *Sanders*, 412 S.C. at 617, 773 S.E.2d at 583 (explaining “although a

defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective”).

The PCR court correctly held Petitioner has not shown counsel provided ineffective assistance that induced him to waive his right to collateral review. This Court should affirm.

CONCLUSION

For the reasons stated above, this court should affirm the PCR Court’s findings that Petitioner waived his right to pursue collateral actions, including claims of ineffective assistance of counsel in post-conviction relief actions.

Respectfully submitted,

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STATE OF SOUTH CAROLINA.....Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Brief of Respondent in the in the above-referenced case on Petitioner by serving his counsel of record, William G. Yarborough, III, Esquire, and Lauren C. Hobbis, Esquire by electronic mail to the address listed for each counsel on AIS, this 16th day of April 2024
I further certify that all parties required by Rule to be served have been served.



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