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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2023-001746

RICHARD A. DUNSTON, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE

The PCR court properly found counsel was not deficient and Petitioner was not prejudiced because Counsel acted within the range of professional norms, and it is not reasonably probable that Petitioner's plea would have been withdrawn.

STATEMENT OF THE CASE

Petitioner Richard Dunston was indicted by the Oconee County Grand Jury in October of 2018 for murder. He appeared for his guilty plea on October 15, 2020, before the Honorable Letitia Verdin, circuit court judge. Appellant pleaded guilty to voluntary manslaughter. Petitioner was sentenced to twenty-five years' imprisonment. Petitioner filed a notice of appeal, and his direct appeal was dismissed on December 16, 2020. Petitioner filed an application for post-conviction relief on November 8, 2021. His PCR hearing was held on February 27, 2023, with the Honorable Perry Gravely presiding. Petitioner's application was dismissed with prejudice. This appeal follows.

STATEMENT OF FACTS

On May 17, 2018, Petitioner unlawfully killed M.L. (Victim) by striking her head and firing a handgun. (App. 9). Petitioner and Victim were engaged in an on again off again relationship. (App. 7). Respondent pled guilty to voluntary manslaughter on October 15, 2020. (App. 1; 6). The State explained that Petitioner had a history of domestic violence against women. (App. 7). During sentencing, the court commented on Petitioner's record noting "It is atrocious. It is atrocious." (App. 23). At the time of the attack, Petitioner was on probation for domestic violence. (App. 7).

In the event of a trial, the State was prepared to produce evidence that Petitioner was in possession of a firearm, was with Victim on a porch, told Victim "I'll shoot you[,]” and left the scene on foot after gunshots were fired. (App. 18; 69). The State was also prepared to show Petitioner told others that he had done a terrible thing and killed the person he loved. (App. 21). The State recommended a twenty-five-year sentence due to the nature of the crime and Petitioner's prior record. (App. 7). During the colloquy, the court ensured Petitioner understood he was pleading to voluntary manslaughter and the possible punishment associated with it. (App. 4). The court confirmed Petitioner had time to speak with Counsel and that Petitioner was happy with what Counsel did for him. (App. 4). Lastly, the court made certain Petitioner was not inebriated or forced or coerced to plea guilty. (App. 4). At this time, Petitioner was asked "and how do you plea" to which he responded "guilty." (App. 5). The State then gave a concise version of facts. (App. 5-6). After this, Petitioner again was asked "how do you plea" to which he responded "guilty." (App. 6).

Petitioner spoke prior to sentencing and stated that his argument with Victim resulted in a struggle for the handgun. (App. 17). Petitioner stated that during this struggle the gun "went off."

(App. 17). Petitioner stated “[e]verybody trying to say that I just up and shot her, and I did not do that.” (App. 17). At this point the court noted it could not accept Petitioner’s plea. (App. 17). Petitioner was next asked whether he pulled the trigger, to which he responded, “more like the gun went off” and “I couldn’t tell you.” (App. 19).

The Court then had the State read over the facts again. (App. 19). After restating the facts, Petitioner again noted his intention to plead guilty. (App. 20). The court noted “he’s admitting to the facts as presented by the State.” (App. 20). Petitioner’s plea was accepted and he was sentenced to twenty-five years’ imprisonment.

At the PCR hearing, Petitioner testified that the facts of his case did not support his conviction. (App. 56-7). Petitioner testified that his lawyer did not give him a chance to talk about this prior to the hearing. (App. 56-7). Lastly, Petitioner claimed he would have wanted a trial had counsel discussed this with him. (App. 56-7).

Counsel explained that due to the pandemic, the plea hearing was held in the Magistrate’s courtroom.¹ (App. 71). Under this arrangement, Petitioner was behind glass and spoke through a portal. (App. 71). Accordingly, Counsel was not able to pull him aside and whisper in his Petitioner’s ear like usual. (App. 71). Counsel testified he met with Petitioner “at least once a month over ten or eleven months.” (App. 64). Counsel testified Petitioner never stated he wanted a trial. (App. 64). With regard to Petitioner’s version of events, Counsel stated Petitioner told him lots of different stories, one of which “just wasn’t true.” (App. 66-7). Regarding the facts, Petitioner recalled at his plea counsel stated, “I had not heard that story.” (App. 68). Petitioner’s application for post-conviction relief was dismissed with prejudice.

¹ The PCR court found Counsel’s testimony credible. (App. 90).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed de novo without deference to the lower court. Id.

ARGUMENT

The PCR court properly found counsel was not deficient and petitioner was not prejudiced because Counsel acted within the range of professional norms, and it is not reasonably probable that Petitioner's plea would have been withdrawn.

Counsel was not ineffective for failing to withdraw Petitioner's guilty plea because Counsel acted within professional norms by negotiating on behalf of Petitioner to receive a favorable agreement. Further, it is not reasonably probable Petitioner's plea would have been withdrawn, because he communicated to Counsel his desire to plea guilty, received a favorable deal by avoiding a possible life sentence, and did not indicate a desire to exercise his right to a jury trial at the hearing.

When the plea was accepted.

In State v. Thomason, our Court of Appeals found the trial court's refusal to allow defendant to withdraw his guilty plea was not an abuse of discretion.² State v. Thomason, 355 S.C. 278, 289, 584 S.E.2d 143, 149 (Ct. App. 2003). In Thomason, the trial court questioned defendant to determine whether he understood the nature of offenses, possible punishments, and rights he was waiving. Thomason, 355 S.C. 281-2 584 S.E.2d 144-5. The court determined the plea was knowingly, voluntarily, and intelligently entered into and noted it would accept the plea if the state gave a factual basis. Id. The state then presented a concise summary of the facts, to which the defendant did not argue were legally insufficient to support the charges. Id. At this point the court inquired the state as to whether they had notified the victims, to which the state was unable to verify.³ Id. The court then recessed the hearing and summoned the victims to

² Defendant pled guilty to resisting arrest. Thomason, 355 S.C. 278, 584 S.E.2d 143.

³ Defendant's attorney gave a brief factual summary that shifted blame for the incident to the arresting officers. "Hearing this, the circuit court asked if the solicitor notified the officers regarding the pleas and the recommendation of probation. When the solicitor could not confirm the officers had been notified, the circuit court recessed[.]" Thomason, 355 S.C. 282, 584 S.E.2d 145.

appear. Id. As a result, defendant moved to withdraw his plea on the basis that his agreement limited the state's factual presentation. Id. The Thomason Court noted that once the state completed its recitation of the facts, the hearing entered the sentencing phase. Thomason, 355 S.C. 287, 584 S.E.2d 146. Thus, the decision on whether to allow defendant to withdraw was within the discretion of the trial court. Id.

Here, the court ensured Petitioner was aware of the offense he was pleading to, the possible punishment, that it qualified as a violent offense, and that he was giving up certain Constitutional rights. (App. 3-5). The court also confirmed Petitioner was not under the influence of drugs or alcohol, was not forced to plea, was not under any medications, and felt clear headed. (App.5). After this, the court asked Petitioner "how do you plea to this charges, guilty or not guilty?" (App. 5). Petitioner responded "guilty." (App. 5). The court then asked the State for the facts that support the conviction. (App. 6). The State then gave a brief version of facts. (App. 6). After this the court asked again "how do you plea, guilty or not guilty?" (App. 6). To this Petitioner answered "guilty." (App. 6). The court responded "All right. I'll accept your plea[.]" (App. 6). The court then began the sentencing phase of the proceeding, with the State noting "Judge, for sentencing purposes[.]" (App. 6).

The court accepted the plea at this portion of the transcript. See Harden v. State, 453 So. 2d 550, 551 (Fla. Dist. Ct. App. 1984) ("we therefore hold that formal acceptance of a plea occurs when the trial court affirmatively states to the parties, in open court and for the record, that the court accepts the plea"). Like Thomason, the court ensured Petitioner knowingly, voluntarily, and intelligently entered into the plea. Correspondingly, after Petitioner pled guilty to the State's recitation of facts, this proceeding entered the sentencing phase.

Ineffective assistance of counsel.

Pursuant to the first prong of the Strickland analysis, Petitioner must show counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 686 (1984); 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." 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. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 141 U.S. 2405, 2410 (2021).

Here, the PCR court properly found Counsel was not deficient because he reasonably advised Petitioner regarding the guilty plea. The State was prepared to produce evidence that Petitioner was in possession of a firearm, was with Victim on a porch, told Victim "I'll shoot you[,]" and Petitioner left the scene on foot after gunshots. (App. 18; 69). The State was also prepared to show Petitioner told others that he had done a terrible thing and killed the person he

loved. (App. 21). Counsel was able to obtain a favorable twenty-five-year sentence, as opposed to a possible life sentence, which contextualizes Petitioner's decision in pleading guilty. (App. 7; 70). Given the possible consequences and potential evidence to be presented at trial, exploring a guilty plea was a logical and competent approach.

Counsel testified he regularly visited Petitioner and sought the plea because "he never told me he wanted to go to trial." (App. 64). Counsel attempted to receive a better deal but was told the Solicitor was "not remotely entertaining" an involuntary plea. (App. 67). Counsel stated that Petitioner told him several different stories of the incident in question. (App. 66). Counsel further stated that he thought the only way to receive an involuntary manslaughter conviction would have required Petitioner to testify and Counsel was worried about the role his prior record would play at trial. (App. 67-8). Given Petitioner's inconsistent factual accounts, prior record, and desire to avoid a life sentence it was reasonable for Counsel to explore and recommend Petitioner plea guilty. At the plea hearing Petitioner stated he had discussed the charge with Counsel and that he was happy with what Counsel had done for him.⁴ (App. 4).

During the sentencing portion, Counsel was not deficient for failing to attempt to withdraw Petitioner's guilty plea. A defendant's plea cannot be withdrawn just because he disagrees with the facts, as long as he knowingly and voluntarily pleads with full understanding of the consequences of his plea and charges against him. State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006). During sentencing, Petitioner did not indicate he unknowingly or involuntarily accepted the plea. Rather, Petitioner indicated he disagreed with the State's version of events. Counsel had no reason to attempt to withdraw Petitioner's plea because Petitioner "never told [Counsel] he wanted to go to trial[,]” and after hearing the facts again, reindicated his

⁴ The PCR court found Counsel's testimony credible. (App. 90).

desire to plea guilty.⁵ (App. 20; 64). In fact, Counsel’s chief concern was whether the plea would go away altogether. (App. 72). Under these circumstances, Counsel’s recommendation was not an approach no competent lawyer would have taken.

Second, counsel’s deficient performance must have prejudiced the petitioner 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. A court need not determine whether counsel’s performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To show prejudice in the context of a guilty plea, a PCR applicant typically must show that he would not have pled guilty but for counsel’s errors and “must convince the court that such a decision would have been rational under the circumstances.” United States v. Fugit, 703 F.3d 248, 260 (4th Cir. 2012) (internal quotation marks omitted). Yet the analysis is different under these circumstances. See Rolan, 384 S.C. 414, 683 S.E.2d 474 (“In this way, the prejudice analysis in this case does not fit squarely within the traditional guilty plea prejudice framework”). Here, because the plea was accepted, the deficiency analysis is whether it is reasonably probable that a motion to withdraw would have been granted. Once a defendant has pled guilty, the decision whether to allow withdrawal is left to the trial court’s sound discretion. State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982); State v. Mansfield, 343 S.C. 66, 538

⁵ Counsel noted his ability to pull Petitioner aside and whisper in his ear was limited due to the courtroom setup during the pandemic. (App. 71).

S.E.2d 257 (Ct. App. 2000). A defendant's plea cannot be withdrawn simply because he disagrees with the facts, as long as he knowingly and voluntarily pleads with full understanding of the consequences of his plea and charges against him. State v. Rikard, 371 S.C. 301-2, 638 S.E.2d 75-6 (Ct. App. 2006) (finding appellant was not entitled to withdraw of her guilty plea where she did not acknowledge the accuracy of the state's factual representation and admitted she was guilty of the charged offenses).

Prior to his application for post-conviction relief, Petitioner never indicated his plea was involuntary or unknowing. Petitioner has failed to meet his burden in establishing a reasonable probability that a motion for withdraw would have been granted.⁶ Accordingly, this Petition for Writ of Certiorari should be denied.


⁶ In the event that Counsel rendered ineffective assistance, this case should be remanded to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea. Rolen v. State, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

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