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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-001151

HERBERT SMALLS

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

To set aside a presumptively-valid guilty plea based on ineffective assistance of counsel, a PCR applicant must show counsel's performance fell below an objective standard of reasonableness and this unprofessional conduct caused him to plead guilty unintelligently or involuntarily. Smalls alleges ineffectiveness, cites his intellectual disability as a factor, but fails to allege coercion or misrepresentation and offers no credible evidence of unprofessional conduct absent which he would have proceeded to trial in this LWOP-eligible murder case. Did the PCR court abuse its discretion by denying relief?

STATEMENT OF THE CASE

In December 2007, a Charleston County grand jury indicted Petitioner Herbert Smalls for the murder of James Stewart, which occurred on April 25, 2007. App. 8–13. Smalls was represented by attorney David Holton. Smalls pleaded guilty on August 2, 2010. App. 10. The Honorable Roger Young, Circuit Court Judge, sentenced Smalls to 40 years' incarceration. App. 10. Smalls was just shy of his 30th birthday at the time of his plea. App. 10.

Smalls appealed his sentence on the ground that the murder statute required that he be sentenced to either life imprisonment or 30 years' incarceration. His appeal was dismissed on issue preservation grounds on October 14, 2010. App. 38.

Smalls filed his initial application for post-conviction relief on September 4, 2013. In his original application, Smalls alleged that he was entitled to relief because his plea was not knowing and voluntary, and because counsel did not file an appeal from his plea. App. 3, 5. Smalls filed an amended application on March 7, 2014, alleging ineffective assistance of counsel. Smalls, citing Boykin v. Alabama, 395 U.S. 238 (1969), alleged counsel was ineffective because he did not advise Smalls he was waiving his right to contest the State's evidence, the indictment to which he pleaded guilty, and potential double jeopardy claims. App. 22–23. He further alleged counsel was ineffective for failing to move for a competency hearing. App. 23. Finally, he raised an allegation of ineffective

assistance of appellate counsel based on counsel's decision to file an Anders[1] brief. App. 23.

In its return, the State alleged the application was untimely because it was not filed within one year of Smalls's conviction becoming final, and moved for summary dismissal on this basis. App. 28. A conditional order of dismissal was issued by Circuit Court Judge Stephanie P. McDonald on March 13, 2014. App. 83. Smalls filed a pro se response on March 25, 2014. App. 85–89. He also filed a pro se motion for summary judgment on June 10, 2014. App. 91–95. A final order of dismissal was signed by Judge R. Markley Dennis on January 16, 2015. App. 103–06. Smalls filed a pro se notice of appeal on February 25, 2015, and a written explanation on March 4, 2015, focusing on his lawyer's failure to properly appeal his guilty plea. App. 113–28.

On April 30, 2015, the Supreme Court issued an order pursuant to Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009), remanding the case "to determine whether petitioner's mental incapacity prevented petitioner from filing the application for post-conviction relief in a timely manner." App. 141. A hearing was convened on December 7, 2017, before the Honorable Michael G. Nettles, circuit court judge. Smalls was represented by counsel. Smalls testified and presented testimony from forensic psychiatrist Leonard Mulbry, who evaluated Smalls to determine whether Smalls was "impaired by mental illness to such an extent that it

[1] Anders v. California, 386 U.S. 738, 744 (1967) (holding appellate counsel may withdraw from frivolous appeal upon submitting brief raising any issues of arguable merit).

would impair his ability to file a timely PCR action." App. 147. Based on the testimony, Judge Nettles ruled that Smalls could pursue a belated PCR action. App. 171, 175–79.

Through counsel, Smalls filed an amended PCR application on June 24, 2018, alleging his plea was not entered knowingly and voluntarily. App. 183. He alleged counsel provided ineffective assistance of counsel in failing to ensure that he fully understood the evidence against him, his trial rights, and the consequences of his plea. App. 183. He alleged "counsel was on notice that Applicant had diminished intellectual capacities." App. 183.

Along with his amended application, Smalls filed a motion to reconstruct his guilty plea hearing due to the fact that the transcript of the 2010 hearing no longer existed. App. 182. A reconstruction hearing was convened before Judge Young on February 9, 2021. The State presented testimony from Julie Cardillo, the assistant solicitor who represented the State at Smalls's plea hearing. Judge Young recited for the record his recollection of the hearing and his normal practice in taking guilty pleas. Finally, Attorney Alex Apostolou testified. Apostolou represented Smalls on an unrelated charge at the time Smalls pleaded guilty in this case, and was present at the plea hearing. The testimony presented at the hearing will be discussed in more detail in the argument section below.

An evidentiary hearing was convened via WebEx on March 22, 2021, before the Honorable Clifton Newman, Circuit Court Judge. Smalls testified and presented the testimony of David Voigt, the lead prosecutor in his case. The State

presented testimony from Alex Apostolou. Judge Newman took the matter under advisement and denied relief in a written order filed August 5, 2022. Smalls filed a petition for writ of certiorari on December 9, 2022, and the State filed a return on March 10, 2023. The supreme court transferred the case to this Court on March 30, 2023. This Court granted certiorari on March 19, 2024, and ordered the parties to brief the additional issue whether Judge Young's order finding the plea hearing record had been sufficiently reconstructed was immediately appealable. Smalls filed the Brief of Petitioner on May 22, 2024. This Brief of Respondent follows.

STANDARD OF REVIEW

The appellate court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them, but will reverse if its decision is controlled by an error of law. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). A lower court's factual finding that a guilty plea was 'voluntarily and intelligently entered is binding upon the appellate court. Vickery v. State, 258 S.C. 33, 35, 186 S.E.2d 827, 827 (1972).

ARGUMENT

The PCR court correctly denied relief because Smalls failed to prove his guilty plea was involuntary.

Smalls pleaded guilty in open court to murder. This case presents a question which has been addressed by courts for decades: "whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." McMann v. Richardson, 397 U.S. 759, 773 (1970). In this PCR action, Smalls carried the burden of showing his plea was not intelligently and voluntarily made due to ineffective assistance of counsel. Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Evidence supports the lower court's finding that he failed to do so. Even though the record of the plea hearing is lost, the existing record—which includes testimony reconstructing the plea hearing and evidence adduced at the PCR evidentiary hearing regarding Smalls's mental capacity—is sufficient to assess his claim. This Court should affirm.

a. The PCR court's finding that the record is sufficiently reconstructed is not immediately appealable.

In its order granting certiorari, this Court directed the parties to brief whether the PCR court's finding that the record of Smalls's guilty plea was adequately reconstructed was immediately appealable. The State agrees with Smalls that the order was not immediately appealable. Such an order does not involve the merits of the case, does not constitute a final judgment, and does not effectively determine the outcome of the case. See S.C. Code Ann. § 14-3-330. Instead, it "simply decides the case should proceed . . . ." Watson v. Underwood, 407

S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014); see also Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) ("An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed."). The lower court's order finding the record was adequately reconstructed merely allowed the PCR court to rule on Small's claims. Because Smalls can now appeal the lower court's judgment, his substantial rights were not affected. Judge Young's order was not immediately appealable.

b. The reconstructed record of Smalls's plea is sufficient to assess his claim.

The reconstructed record of Smalls's guilty plea is sufficient to enable meaningful review of his claim that counsel provided ineffective assistance such that his plea was not knowing and voluntary. Unlike when a trial transcript is lost, there is little mystery about what occurred at Smalls's plea: the plea court advised Smalls of the rights he was waiving and Smalls admitted he was guilty. The lower court did not need a verbatim transcript of this largely boilerplate proceeding to assess Smalls's claims.

Guilty pleas are presumed to be valid. Garren v. State, 423 S.C. 1, 20, 813 S.E.2d 704, 714–15 (2018) (Few, J., concurring) (explaining "it is the applicant's burden to demonstrate the plea was not valid"). A lost transcript is not, in itself, a sufficient reason to set aside a valid guilty plea. United States v. Dickerson, 901 F.2d 579, 583 (7th Cir. 1990) (explaining "an untranscribed court proceeding does not, in and of itself, require a holding that a guilty plea was infirm"); see also

Norvell v. Illinois, 373 U.S. 420, 424 (1963) ("When, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made."); Jackson v. State, 826 N.E.2d 120, 129 (Ind. Ct. App. 2005) (explaining "the mere fact that the transcript of his plea hearing is missing and no one present at the hearing can remember details of it does not warrant relief from the 1979 plea. Instead, the validity of the plea is presumed"). The question is whether the reconstructed record is sufficient to enable "meaningful appellate review." State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007).

When the transcript of a guilty plea is lost, the appellate court should examine "the custom, practice and law applicable to . . . guilty pleas and if possible the particular court's practice to determine whether the plea was an intelligent and voluntary waiver." Dickerson, 901 F.2d at 583; see also Com. v. Quinones, 414 Mass. 423, 432, 608 N.E.2d 724, 730 (1993) ("We see no impropriety, moreover, in relying on a judge's customary practice in taking guilty pleas to reconstruct the record."). "If the defendant's 'intelligent awareness' can be reasonably inferred from this evidence, then the plea passes muster." United States v. DeForest, 946 F.2d 523, 526 (7th Cir. 1991).

Unlike trials, guilty pleas follow a predictable, consistent procedure. Cf. Ladson, 373 S.C. at 327, 644 S.E.2d at 274 (finding trial record could not be constructed where judge and attorneys could not remember specifics of the "lengthy multi-day and fact-intensive trial" and appellate court was "left with a few

gratuitous references to generic motions and objections, but we do not know the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence"). Certain constitutionally-required findings regarding the waiver of trial rights are made in every plea hearing. See Boykin v. Alabama, 395 U.S. 238, 243 (1969). Circuit court judges take hundreds of guilty pleas every year, and Judge Young testified he invariably followed the same procedure in each plea hearing.

There is even more justification for not requiring precise reconstruction in PCR cases. PCR cases always depend on retrospective testimony to "reconstruct" the interactions between attorneys and criminal defendants during the course of the representation. Most of these interactions will never be recorded. Instead, the PCR court must rely on the memories of the applicant, his attorney, and other witnesses to determine what happened. Typically, the trial or plea transcript is a part of record before the PCR court. But, as discussed above, the absence of a plea hearing transcript in itself does not prevent the PCR court, or an appellate court, from analyzing a claim of an involuntary guilty plea based on ineffective assistance of counsel.

At the reconstruction hearing, Judge Young explained his normal procedure for accepting guilty pleas. Judge Young explained he consults a checklist for guilty pleas and that he always advises defendants of their rights when they plead guilty. App. 209–11. He also requires defendants to affirm they understand their trial rights and that they are forfeiting those rights by pleading guilty. App. 211. He

further explained that he always inquires whether defendants are under the influence of drugs or alcohol and whether they understand what they are doing. App. 212–13. He explained he would have expected that plea counsel Holton would have voiced any concerns about Smalls's mental health or medications he was taking because Holton was an "excellent lawyer." Judge Young explained he always follows up if there is any concern about whether medication affected the defendant's ability to understand what he is doing. App. 212–13. He explained that "obviously, if there was an issue about competency to stand trial or plead, we wouldn't go any further." App. 213.

Judge Young further explained in detail his normal plea procedure, and that he always makes a finding that the plea was made knowingly and voluntarily. App. 214–15. He concluded: "I wouldn't have let the plea go forward if I didn't think Mr. Holton had done everything properly." App. 225. Judge Young elaborated:

> And if I had any indication that he . . . either had a condition or was taking medication, I would have followed that up and . . . would have been satisfied that he had either been tested, a doctor said he had capacity, or if the lawyer had said, well, I didn't think that was necessary, but I do want to bring to your attention that he . . . sometimes it's depression or, you know, sometimes it's schizophrenia is a whole other thing. But sometimes people are taking a lot of different kinds of medication. And if I'd had any indication that he was taking medication or had been advised that he was taking medication, you know, that's how I would have addressed it was to inquire as to what it was, when he had taken it last, was it the prescribed amount. And I almost always say, tell me what you're doing here, when they assure me they know what they're doing. And, again, before I go to the next step, I'm satisfied. And I would have gotten an affirmative response to asking Mr. Holton if he felt like his client knew what he was doing, because that's part of my standard question. Even in cases [where] there aren't mental health issues, but especially if there are mental health issues, I usually ask them twice, as well as make a finding that they are. . . . I would not

> have allowed a hearing or a sentence to go forward had I not checked off all those blocks, you know, that I set up along the way in different phases.

App. 227–29.

Assistant Solicitor Julie Cardillo represented the State at Smalls's guilty plea and testified at the reconstruction hearing. App. 193. She testified she did not remember the specifics of Smalls's plea, but testified to Judge Young's normal practice in accepting guilty pleas, which typically included the defendant admitting guilt and stating that his plea was not coerced. App. 196–99. She testified Judge Young would have stopped the plea if he was concerned about Smalls having an intellectual disability or being under the influence of drugs or alcohol. App. 199. She testified: "I always recall Judge Young being very . . . not rushing through anything, in my opinion, ensuring . . . all rights of both sides were followed." App. 202–03.

Assistant Solicitor Gregory Voigt was the lead prosecutor on Smalls's case, but did not represent the State at the plea hearing because he was sick. App. 257. He did not testify at the reconstruction hearing, but was called as a witness at the PCR evidentiary hearing. He testified he had done more than 50 pleas in front of Judge Young and that Judge Young's plea colloquies were "exactly what one should expect given [the] Boykin [vs.] Alabama case." App 256.

Finally, Attorney Alex Apostolou was present at Smalls's plea and presented the most concrete evidence at the reconstruction hearing. App. 216. At the time of Smalls's plea, Apostolou was representing Smalls on an attempted armed robbery

charge which was later dismissed. App. 217. He attended Smalls's plea hearing and was interested in the outcome. Apostolou did not recall any mental health issues being discussed at the plea. App. 219. He testified that "if that topic . . . had been opened in the courtroom, it would have been explored." App. 220. Apostolou testified at the PCR evidentiary hearing that, from his memory, Smalls's plea was consistent with Judge Young's normal plea procedure. App. 279. Crucially, Apostolou remembered that Smalls "agreed with the facts" following the solicitor's recitation of the factual basis at the plea hearing. App. 281.

In light of these facts, it is not credible to allege that anything out of the ordinary happened at Smalls's plea hearing. As the PCR court remarked: "there's no way I would take a guilty plea on a murder case without making certain that the person is satisfied with the representation of the lawyers, you know, no promises have been made regarding a sentence. That he is in fact guilty, and of course Mr. Apostolou said he did acknowledge guilt." App. 316.

What happened at the plea hearing is a question of fact, the PCR court's determination of which must be affirmed if there is any evidence to support it. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Smalls argues the PCR court could not say what "actually" happened, only what "probably" happened. Brief of Petitioner at 22. In doing so, Smalls is arguing with the lower court's factual findings. By finding Judge Young followed his typical plea procedure, the PCR court determined what actually happened. Judge Young's testimony at the reconstruction hearing, as well as that of Apostolou and Cardillo, support the PCR

court's finding. This Court is bound by those findings. Vickery v. State, 258 S.C. 33, 35, 186 S.E.2d 827, 827 (1972) ("A lower court's factual finding that a guilty plea was voluntarily and intelligently entered is binding upon the appellate court."). This record, when combined with the other testimony presented at the PCR hearing, is sufficient for this Court to assess the PCR court's ruling that Smalls failed to prove his plea was involuntary.

What is important in this case is whether plea counsel acted in such a way that he improperly caused the applicant to plead guilty involuntarily or unintelligently. This Court does not need a verbatim transcript of the plea hearing—which, according to the facts adduced at the reconstruction hearing, was almost certainly a normal, run-of-the-mill hearing—to assess that claim. See Adams v. Wise, No. 1:21-CV-01248-JMC, 2022 WL 788873, at 4 (D.S.C. Mar. 15, 2022) (denying habeas relief from reconstructed plea hearing where testimony showed hearing was "basically a standard plea"). In addition to the credible evidence about Judge Young's normal plea procedure, the PCR court had the benefit of Alex Apostolou's first-hand account of the plea hearing, including the fact that Smalls admitted his guilt to the plea court. More importantly, the Court has the evidence Smalls presented at the PCR evidentiary hearing about what happened leading up to the plea, which is more probative to his claim than the more or less boilerplate proceedings of the plea hearing. The record is sufficient to enable review of Smalls's claim.

c. Smalls failed to prove that his attorney was ineffective such that his plea was not intelligently and voluntarily made.

Evidence supports the PCR court's finding that Smalls failed to prove his attorney provided ineffective assistance such that it caused him to plead guilty unintelligently or involuntarily. Smalls vaguely asserts that his attorney's representation, combined with his diminished intellectual capabilities, caused him to plead guilty involuntarily. However, Smalls fails to credibly identify any coercive actions, misrepresentations, or other unprofessional errors by his attorney, apart from his dubious claim that he only saw Holton twice before he pleaded guilty and Holton did not discuss any of the evidence with him. Crucially, Smalls never testified that he did not understand he was giving up his trial rights by pleading guilty, which is the focus of his argument to this Court. Rather, he essentially testified at the PCR hearing that he pleaded guilty on the advice of counsel. App. 273–75. His testimony itself supports a finding that his plea was voluntary. Likewise, his assertions that his mental health challenges caused him to plead guilty involuntarily are not supported by the evidence, and Smalls failed to demonstrate a lack of understanding at the time of his plea.

The "guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. . . . These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." Blackledge v. Allison, 431 U.S. 63, 71 (1977). "More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he

succeeds in vacating the judgment of conviction, retrial may be difficult." Blackledge, 431 U.S. at 71–72. "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). A valid guilty plea "must be treated as final in the vast majority of cases." Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014).

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). A PCR applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence. SCRCP 71.1. Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985).

Smalls has failed to show counsel was deficient. He essentially alleged that Holton advised him to plead guilty rather than proceed to trial and face a life sentence, and claims this constitutes ineffective assistance because the case against him was weak. App. 264–65. Smalls claimed that "[t]he only thing he ever [told] me, I'm looking at a life sentence, go ahead and plead guilty." App. 264. While Smalls thus testified that Holton urged him to plead guilty, he stopped short of alleging that Holton made any false promises or coerced him in any way.

Though he did not allege coercion or misrepresentation, Smalls claimed Holton only met with him twice before his plea hearing, and that Holton did not go over the police reports with him.[2] App. 263–68. However, the PCR court questioned Smalls's credibility in this regard, and understandably so. App. 312. Holton was an experienced criminal attorney, and the allegation that he only spoke with Smalls twice before his plea is dubious on its face. App. 291–92. Judge Young remarked at the reconstruction hearing that Holton was, in his opinion, an "excellent lawyer" who "always did a good job . . . ." App. 209. Apostolou testified he had a "high estimation of Mr. Holton." App. 291–92. Smalls's self-serving allegation is not credible. United States v. DeForest, 946 F.2d 523, 526 (7th Cir. 1991) ("DeForest offered no evidence, other than his own self-serving testimony, to prove that his plea violated pre-Boykin standards. The district court found that

[2] Smalls made additional dubious claims, e.g. that he told the plea court that he "didn't feel right" about pleading. App. 275. Upon questioning by the PCR court, Smalls then claimed "I said my lawyer keep [sic] telling me to go ahead and plead so I said I'm gonna plead."

DeForest's testimony was incredible, and we defer to its finding."). Evidence supports the PCR court's finding in this regard. See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) ("This Court gives great deference to a PCR judge's findings where matters of credibility are involved.").

The solicitor admitted there were weaknesses in the State's case against Smalls. App. 248–53. But even if the case against Smalls was weak, there were legitimate reasons to advise against going to trial. For one, Smalls was eligible for a life-without-parole sentence due to his previous convictions. Because Smalls pleaded guilty, the State did not pursue an LWOP sentence. App. 257–59. The State also dismissed a pending attempted armed robbery charge following the plea. App. 278–79. Secondly, there was an eyewitness prepared to testify against Smalls. App. 260. The solicitor "met with that person" and "was satisfied that it was going to pass muster." App. 260. Regardless of the weaknesses in the case, the solicitor testified he had enough evidence to bring the case to trial, and this created uncertainty for both Smalls and Horton about how trial would play out.

"Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." McMann v. Richardson, 397 U.S. 759, 770 (1970). "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." Id. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable

professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). A defendant is "bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." McMann, 397 U.S. at 774.

In Premo v. Moore, 562 U.S. 115 (2011), the United States Supreme Court explained:

> Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial . . . . The added uncertainty, that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place.

Premo v. Moore, 562 U.S. 115, 132 (2011) (emphasis added).

PCR counsel asserted Holton was suffering from mental health issues which caused his performance to suffer, but did not offer any actual evidence in that regard. App. 293. Alex Apostolou, who represented Smalls in another case when Smalls pleaded guilty, offered the only substantive evidence about what was going on with Holton. He testified that Holton stopped practicing law sometime after Smalls's plea, but did not recall exactly when. App. 292. He testified Holton moved away and he "hadn't seen him in a long time. . . . I know that he was medically unable, I didn't know the nature of his ailment." App. 292. Counsel for the State

agreed that Holton was unable for medical reasons to participate in the PCR hearing, but neither party offered evidence as to Holton's mental health at the time of Smalls's plea. App. 244. The evidence in the record falls far short of showing Holton's health caused him to provide ineffective assistance in Smalls's case. Apostolou testified he was surprised at the quick turnaround of Smalls's plea. But even had counsel extended the bargaining process, Smalls failed to show he would have ultimately insisted on going to trial rather than plead guilty.

In his summation, PCR counsel again failed to allege coercion or misrepresentation. Rather, the focus of his presentation was that Smalls was not "well informed as to the deficiencies in the State's case." App. 296. Tellingly, he argued "there is a difference between I'm pleading guilty because I am guilty versus I'm pleading guilty because I'm worried about going to prison for the rest of my life . . ." App. 300. Apprehension about the potential of a life sentence does not equal ineffectiveness by plea counsel. It merely shows that Smalls had to weigh the risks of going to trial against the benefits of pleading guilty. An applicant "may not challenge a lawful sentence merely because he was hoping for a more lenient one." Garren, 423 S.C. at 9, 813 S.E.2d at 708. That Smalls made his decision to plead because he was "worried about going to prison for the rest of [his] life" does not show deficiency by counsel. Rather, it shows rational decision-making by Smalls.

As to the mental health aspect of his claim, Smalls again produced very little evidence to support the claim. At the evidentiary hearing, Smalls did not offer any medical or psychological testimony from a doctor, psychologist, or anyone else. The

extent of his presentation in this regard was his own testimony. App. 266–67. Smalls testified he suffers from "mood swings," takes medication to treat that condition, and had been "on medication" since childhood. App. 266. He testified he was in special education classes throughout his life. App. 266–67, 277. Finally, he testified he had a brain injury as a child where he "fractured [his] head." App. 267. The PCR court questioned Smalls further about the head injury, and Smalls testified that he had been in a car accident when he was 14. App. 276. He offered no testimony to explain how his head injury affected his decision-making. Similarly, while Smalls testified he was taking medication to treat bipolar disorder, he offered no evidence to explain how this medication affected his cognition or his ability to decide intelligently whether to plead guilty. See United States v. Carter, 795 F.3d 947, 951–55 (9th Cir. 2015) (rejecting a defendant's claim that his guilty plea was entered involuntarily where he failed to "explain how the medications at issue would have impacted his ability to enter a plea knowingly and voluntarily"). The PCR correctly found that none of the evidence presented by Smalls "explains if or how the [mental health problems] prevented him from being able to knowingly and intelligently plead guilty . . . ." App. 338.

At the prior Ferguson[3] hearing, Smalls presented testimony from forensic psychiatrist Leonard Mulbry. But while PCR counsel referenced Mulbry's testimony at the PCR hearing, App. 294, he apparently did not provide Dr. Mulbry's

[3] Ferguson v. State, 382 S.C. 615, 620, 677 S.E.2d 600, 602 (2009) (providing a PCR court may allow a belated PCR hearing when mental incompetence prevented the filing of a PCR application).

report to the PCR court.[4] App. 330. Accordingly, the PCR court could not have abused its discretion by denying relief based on Dr. Mulbry's testimony because it was never given the opportunity to consider this evidence. See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments.") (emphasis added).

Regardless, Dr. Mulbry's testimony does not prove Smalls's claim. At the Ferguson hearing, Dr. Mulbry testified he examined Smalls's school records and SCDC records but did not examine any mental health records. App. 148. Testing conducted when Smalls was 15 years old suggested that Smalls's IQ at that time was between 48 and 52, which would indicate "mild to moderate" mental retardation, but not severe disability. App. 148. Smalls also had significant behavioral issues and was expelled in elementary, middle, and high school. App. 149. Mulbry opined that Smalls's SCDC records also showed significant behavioral issues, but that these issues were "more behavioral, more related to his other mental illness than to the low intelligence." App. 152. Mulbry evaluated Smalls personally when Smalls was 36 years old. App. 151. Mulbry did not conduct an IQ test, but guessed that Smalls's intelligence would be higher than 50, but could not

[4] It is the State's understanding that the Ferguson hearing had not been transcribed at the time of Smalls's PCR evidentiary hearing, meaning the PCR court could not have viewed it. In its order, the PCR court noted it had viewed the transcript of the reconstruction hearing, but made no mention of the Ferguson hearing testimony or Dr. Mulbry's report. App. 330.

give an opinion as to what his IQ was at the time. App. 153. Mulbry diagnosed Smalls with "mild to moderate" intellectual disability. App. 156. Mulbry testified Smalls was being treated for bipolar disorder at SCDC, and that Smalls was treated with medication for his "bipolar disorder or some significant mood disorder" from a young age. App. 153. Mulbry opined Smalls "would have a difficult time keeping up with dates, times, and more importantly, planning," and that Smalls was "not really very literate." App. 156–57.

It is unclear why Smalls did not offer this evidence at the evidentiary hearing. Regardless, Dr. Mulbry's testimony does not establish that Smalls's mental health problems caused him to plead guilty involuntarily or that he was incapable of making a rational decision whether to plead. Dr. Mulbry did not offer any opinion regarding Smalls's mental state at the time of his plea. See Garren, 423 S.C. at 16, 813 S.E.2d at 712 ("Nothing in the guilty plea transcript suggest Garren was under the influence of drugs or otherwise dispossessed of his mental faculties at the time the guilty plea was entered.") (emphasis added). Smalls's high school records and the IQ test he took at age 15 have limited value to show his condition when he pleaded guilty at age 29. Dr. Mulbry's interview of Smalls when he was 36 years old is similarly limited in value. As the PCR court noted, "it's not unusual for someone who's been locked up in prison for many years to have a decline in their mental state." App. 319. Dr. Mulbry's testimony was offered on the issue whether Smalls should have been allowed to pursue a belated PCR action; he offered no testimony about the impact his mental health history would have on his

decision to plead guilty. Even if this Court considers Dr. Mulbry's testimony in its analysis despite the fact that the PCR court was not given the opportunity to consider it, these facts show that Smalls failed to prove his claim even with Mulbry's testimony. The PCR court correctly characterized Smalls's claim as speculative. App. 311.

Smalls's claim that his diminished intellectual capacity rendered his plea unknowing and involuntary is contradicted by the testimony of Alex Apostolou, the attorney who represented Smalls on an attempted armed robbery charge at the time Smalls pleaded guilty to the murder charge. Apostolou testified that while Smalls was not a "very sophisticated defendant," he was not concerned that Smalls was incompetent. App. 282–83.[5] Apostolou testified that if he had any concerns about Smalls's competency, he would have had him evaluated. App. 283. Apostolou testified specifically that Smalls was able to assist in his defense and that he was able to talk through the "pretty elaborate" discovery materials with him. App. 289.

Smalls claims the PCR court improperly focused on his competency to plead guilty but neglected to consider his ability to understand the rights he was waiving. This is a distinction without a difference that ignores the presentation Smalls made below. Smalls's ability to understand the consequences of his plea goes to the heart

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[5] Smalls disputes the PCR court's finding that Apostolou "never had any concerns regarding Mr. Smalls's competency . . . ." Brief of Petitioner at 21–22. However, this is essentially what Apostolou said. He testified: "I knew Mr. Smalls to not be a very sophisticated defendant, but as far as competency and not being able to know, I mean, obviously if I felt that he was incompetent then I would have tried to have that evaluated. So, no, I didn't feel that he below [sic] that, unfortunately, very low standard." App. 282–83.

of both his competency and his understanding of his trial rights. Smalls supported his claim that he did not understand the rights he was waving by presenting evidence about his mental capacity. Of course the trial court took this into consideration when addressing his allegations.

Further contradicting Smalls's claim is the fact that he had twice before been convicted of crimes, meaning he made it through the criminal process despite his mental health issues. Smalls would have been subjected to a court's scrutiny of his competence at those hearings as well, and would have had the benefit of Boykin's constitutionally-required safeguards.

This case is similar to Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). Like Smalls, Jeter claimed his plea was involuntary due to mental health issues, and specifically pointed to the fact that he was taking medication around the time of his plea. Medical records indicated Jeter "had some problems with his mentation and was a little slow answering questions. Other portions of the records indicate he was able to give detailed sequential account of the events leading to his incarceration, was socially appropriate and asked relevant questions." Jeter, 308 S.C. at 231–32, 417 S.E.2d at 595. Jeter's trial attorney testified he did not "notice anything abnormal to make me think he was mentally deficient." Jeter, 308 S.C. at 231–32, 417 S.E.2d at 595. The court found the "excerpts from the medical records are of little probative value," in part because they did "not directly relate to the petitioner's ability to consult with his attorney or to understand the proceedings."

Jeter, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). The Supreme Court held the PCR court properly denied relief.

Small's assertions are woefully lacking in factual support. Even if Smalls has "mild to moderate" intellectual disability, and even if he suffers from bipolar disorder, this does not prove his decision to plead guilty was involuntary. His claim is based on speculation. PCR counsel argued below: "I'm not saying that he would have failed a Blair hearing at that time. I'm just saying that he was under a lot of medication and he might not have been making the best decisions. And he might not have been making intelligent decisions, and he might have been overborne by persuasion from his attorney." App. 318 (emphasis added). This equivocal claim about what "might" have happened at the plea hearing falls far short of the type of factual showing necessary to overturn a presumptively valid guilty plea to a murder charge. Evidence supports the PCR court's findings. See Vickery, 258 S.C. at 35, 186 S.E.2d at 827 ("A lower court's factual finding that a guilty plea was voluntarily and intelligently entered is binding upon the appellate court."). The PCR court did not abuse its discretion by denying relief. This Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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August 20, 2024

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-001151

HERBERT SMALLS, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Susan Spencer, certify that I have served the within Brief of Respondent on Elizabeth Franklin-Best, Esquire, counsel of record for the Petitioner, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 20th day of August, 2024.

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Susan Spencer

From: Susan Spencer
Sent: Tuesday, August 20, 2024 11:40 AM
To: elizabeth@franklinbestlaw.com
Cc: Josh Edwards; Vickie Hall
Subject: Herbert Smalls v. State of South Carolina (2022-001151)
Attachments: SMALLS Herbert - Corrected Copy of Brief of Respondent (03669850xD2C78).PDF

Good Morning Ms. Franklin-Best,

Attached please find a corrected copy of the Brief of Respondent in Herbert Smalls v. State of South Carolina (2022-001151). This document will be filed today to the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

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