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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Commons Pleas
Appeal from Charleston County
Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2023-001091

ANTONIO SIMMONS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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STATEMENT OF ISSUE ON CERTIORARI

"Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by plea counsel's failure to object and move to withdraw when the plea judge refused to sentence in accordance with the negotiated sentencing range and instead sentenced Petitioner to an increased but suspended sentence?"

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge somehow err by declining to grant a new trial to Simmons when Simmons's guilty pleas were validly and voluntarily entered and were not—and could not have been—retroactively rendered involuntary by defense counsel's failure to object to the sentence imposed, by defense counsel's failure to move for the guilty pleas to be withdrawn, or by anything else?

STATEMENT OF THE CASE

In April of 2014, Petitioner Antonio Simmons was arrested following an investigation into a series of similar armed robberies that had been committed at a variety of different locations throughout Charleston County over the course of the preceding few months.[1] In December of 2014, the Charleston County Grand Jury indicted Simmons for ten counts of armed robbery along with ten counts of possession of a weapon during the commission of a violent crime. On March 20, 2018, Simmons appeared in the Charleston County Court of General Sessions and entered negotiated guilty pleas to five of the indicted counts of armed robbery before the Honorable R. Markley Dennis, Jr., circuit court judge.[2] During the plea hearing, Judge Dennis accepted Simmons's guilty pleas and sentenced him to a thirty-year term of imprisonment that was suspended upon the service of an eighteen-year term of imprisonment for one of the counts along with concurrent eighteen-year terms of imprisonment for the remaining four counts. Following that, Simmons did not appeal his convictions or aggregate sentence.

Roughly six months later, Simmons timely filed an application for post-conviction relief ("PCR") seeking for his guilty pleas to be vacated and a new trial to be granted. In response, the State filed a return requesting an evidentiary hearing and a more definite statement of the grounds being raised. On July 23, 2019, an evidentiary hearing was conducted in the Charleston County Court of Common Pleas with the Honorable Michael G. Nettles, circuit court judge, presiding. At the conclusion of the hearing, Judge Nettles "vacated" Simmons's sentence, granted resentencing, and dismissed all other claims, and that ruling was confirmed through a

[1] Notably, after Simmons was arrested, the armed robberies stopped. (App'x p. 22).

[2] In exchange for the entry of the guilty pleas, the solicitor dismissed Simmons's other fifteen charges. (App'x p. 4).

written order filed on October 1, 2019. Following the issuance of the final order, Simmons again did not initiate an appeal.[3] [4]

Thereafter, in December of 2019, Simmons filed a second PCR application. Through it, Simmons solely sought belated appellate review of Judge Nettles's partial denial of his first PCR application since no appeal had been filed on his behalf.

Before the second PCR application could be ruled upon, a resentencing hearing was conducted on January 10, 2020, in the Charleston County Court of General Sessions with Judge Dennis once again presiding. At the conclusion of that hearing, Judge Dennis sentenced Simmons to concurrent terms of imprisonment of twenty-eight years for the five armed robbery convictions, and that ruling was confirmed through a written order filed on January 15, 2020. Simmons then timely filed a notice of appeal.

On appeal, the parties filed their briefs in the Court of Appeals, and the Record on Appeal was likewise filed.[5] However, before the case could be decided, Simmons moved to voluntarily

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[3] Toward the conclusion of the evidentiary hearing, PCR counsel advised Judge Nettles he was going to file an appeal "to be safe," but he did not end up doing so. (App'x pp. 126-127).

[4] While Judge Nettles appeared to have vacated Simmons's sentence in its entirety instead of only partially, his decision to do so was not improper under the circumstances involved. See Pepper v. United States, 562 U.S. 476, 507 (2011) (explaining "[a] criminal sentence is a package of sanctions that the [sentencing] court utilizes to effectuate its sentencing intent" and, thus, a reviewing court may vacate an entire sentence whenever reversing only a portion of a criminal defendant's sentence because a limited partial reversal may fundamentally alter the original sentencing judge's sentencing intent (citation and internal quotations omitted)); Greenlaw v. United States, 554 U.S. 237, 254 (2008) (recognizing the practice of vacating an entire sentence and remanding for resentencing following a successful challenge by a criminal defendant to a portion of an aggregate sentence ensures the defendant's sentence will fit the offender as opposed to merely the individual offense while further guaranteeing "the assessment will be made by the sentencing judge exercising discretion, not by an appellate panel ruling on an issue of law no party tendered to the court").

[5] Although not included in the appendix, the records associated with Simmons's appeal following resentencing are currently available through the South Carolina Appellate Court Public Index.

withdraw his appeal.[6] The Court of Appeals granted Simmons's motion and dismissed the appeal. The remittitur was issued on February 25, 2022.

Subsequently, on November 3, 2022, a evidentiary hearing was conducted to address Simmons's second PCR application in the Charleston County Court of Common Pleas with the Honorable Diane Schafer Goodstein, circuit court judge, presiding. At the conclusion of the hearing, Judge Goodstein granted Simmons belated appellate review of Judge Nettles's order from the first PCR action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), and that ruling was confirmed through a written order filed on April 14, 2023.[7] Simmons then filed a notice of appeal.[8] [9]

Appellate Records for State v. Antonio Orlando Simmons, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=71471.

[6] As support for his motion, Simmons—in a sworn and notarized affidavit—affirmed he had been informed he would "forever waive" the issues he could raise on appeal by withdrawing his appeal but nonetheless was electing to do so "with a full understanding of all the possible consequences of this action." Appellate Records for State v. Antonio Orlando Simmons, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=71471.

[7] In her order, Judge Goodstein also ruled Simmons's "other post-conviction relief claims in the PCR regarding resentencing are stayed pending a resolution of the Austin appeal." (App'x p. 233).

[8] The timeliness of the notice of appeal—which was served and filed on July 10, 2023—remains unclear as it was submitted *eighty-seven* days after Judge Goodstein's order granting belated appellate review was filed and it contains no information about when written notice of entry of that order was received. Appellate Records for Antonio Simmons v. State, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=78834.

[9] After initiating his most-recent appeal, Simmons filed two more PCR applications with the Charleston County Court of Common Pleas. Records for Antonio O. Simmons, Charleston County Public Index, https://jcmsweb.charlestoncounty.org/PublicIndex/. However, both those applications were subsequently dismissed. Id.

STATEMENT OF FACTS

Between December of 2013 and March of 2014, a number of highly-similar armed robberies were carried out at different Charleston County restaurants, gas stations, and stores. (App'x pp. 19-20). Due to the similarities between the crimes, the law enforcement officers who began investigating them suspected they were likely being perpetrated by the same individuals. (App'x p. 20).

As the investigation into the armed robberies progressed, Simmons was identified as a potential suspect. (App'x pp. 21-22). Through further investigation, Simmons was determined to have been at the location of the majority of the crimes based on information obtained from his phone records. (App'x p. 21). Similarly, evidence consistent with items worn by the robbers was found amongst trash left outside Simmons's home. (App'x p. 21).

Based on that, Simmons was tracked down and taken into custody. (App'x pp. 21-22). Once he had been apprehended, Simmons was interviewed by officers, and, during the course of the interview, he confessed to having committed two of the armed robberies. (App'x p. 22). A search was then conducted at Simmons's home, and further evidence linking him to the crimes was recovered. (App'x p. 22).

Subsequently, Simmons was indicted for twenty total offenses, including ten counts of armed robbery, in connection to his crime spree. (App'x p. 4). Based on the "most serious" nature of Simmons's offenses, the solicitor considered pursuing separate convictions in order to subject Simmons to a mandatory sentence of life without parole. (App'x pp. 5-6). However, following negotiations with defense counsel, the solicitor extended a plea offer that would have permitted Simmons to receive an aggregate sentence of twenty to twenty-five years. (App'x p. 5). Ultimately though, Simmons rejected that offer. (App'x p. 5).

Following that, Simmons's original defense counsel was relieved, and new defense counsel was appointed to investigate whether Simmons might be suffering from some mental health or competency issues. (App'x pp. 5-6). Based on that investigation, Simmons was determined to be competent, and Simmons's new defense counsel began renewed negotiations with the solicitor. (App'x p. 3; p. 6). Through those negotiations, the solicitor agreed to extend a revised offer that would result in Simmons receiving an aggregate sentence between seventeen and twenty-eight years in exchange for pleading guilty to just five of his twenty pending charges.[10] (App'x p. 4; p. 6). In response to that offer, Simmons accepted. (App'x p. 13).

Thereafter, a plea hearing was conducted before the plea judge, and Simmons entered negotiated guilty pleas to five counts of armed robbery. (App'x p. 1; p. 13; pp. 15-16; p. 32). In doing so, Simmons—more than once—confirmed he was, in fact, guilty of the armed robberies. (App'x p. 25; p. 32). Likewise, Simmons confirmed he understood he was receiving a "major benefit" by being able to avoid a possible mandatory sentence of life without parole, and he acknowledged he could be sentenced to no less than seventeen years up to twenty-eight years of "active time" pursuant to the terms of the plea agreement. (App'x pp. 13-16; p. 27). Furthermore, Simmons confirmed he understood the constitutional rights he would be relinquishing by entering his guilty pleas, understood the consequences of his decision, and nonetheless wanted the plea judge to accept his guilty pleas. (App'x p. 25; p. 32).

Following all that, the plea judge accepted Simmon's guilty pleas as freely, voluntarily, knowingly, and intelligently entered. (App'x p. 33). The plea judge then imposed a thirty-year term of imprisonment suspended to an eighteen-year term of imprisonment for one of the armed robbery convictions along with concurrent eighteen-year terms of imprisonment for all the other

[10] Later on, the plea judge described the solicitor's offer as "extremely fair." (App'x p. 37).

convictions. (App'x p. 37; p. 40). In structuring Simmons's sentence in that manner, the plea judge explained "the only way" he was willing to accept the eighteen-year "active time" sentence he imposed was his perceived ability to also include "exposure time" by suspending a portion of the sentence. (App'x p. 38). He further explained he specifically structured Simmons's sentence in such a manner because he believed it would provide needed protection to society by ensuring Simmons would have to serve a total of thirty years if he was not able to successfully complete the statutorily-mandated period of community supervision that would follow the initial "active time" portion of his sentence. (App'x pp. 37-38).

Subsequent to that, Simmons filed his first PCR application through which he raised a number of claims. (App'x pp. 57-63). Notably though, Simmons did *not* allege in his application his guilty pleas were involuntary or his sentence was illegal. (App'x pp. 57-63).

Nevertheless, during the ensuing hearing on the matter, Simmons's PCR counsel began by arguing the "sole issue" that needed to be addressed was a claim Simmons's guilty pleas were involuntary. (App'x pp. 74-75). And, in addition to that, PCR counsel further alleged Simmons "would be entitled to *resentencing* under the law" because his sentence was illegal "according to the statute" and, at one point, appeared to suggest the plea negotiations themselves had somehow been illegal. (App'x p. 75; p. 83) (emphasis added).

As the hearing continued on, Simmons testified on his own behalf. (App'x pp. 85-95; pp. 112-114). In doing so, Simmons claimed he did not actually want to plead guilty and only did so due to his defense counsel's ineffectiveness. (App'x pp. 86-87). However and importantly, Simmons stressed he had no complaints about defense counsel's performance *aside from* a complaint defense counsel failed to get his charges dismissed due to a double jeopardy violation that he believed had occurred. (App'x p. 87; pp. 89-92). Beyond that, Simmons never once

during his testimony mentioned the sentence imposed and never at any point testified he wanted defense counsel to move withdraw his guilty pleas based on the sentence he had received. (App'x pp. 85-95; pp. 112-114).

In addition to Simmons's testimony, Simmons's defense counsel also discussed his representation of Simmons. (App'x pp. 96-107). Notably, as part of his testimony, defense counsel confirmed he was able to successfully obtain a plea offer from the solicitor with a negotiated sentencing range of seventeen to twenty-eight years. (App'x p. 102). Defense counsel further explained Simmons initially wanted to go forward to trial but decided to enter his guilty pleas due to the *possibility* of receiving a seventeen-year sentence based on that offer. (App'x pp. 102-103).

After that testimony was presented, PCR counsel—while focusing exclusively on the fact a portion of Simmons's sentence had been *suspended*—argued Simmons's sentence was illegal. (App'x p. 116). And, due to the purportedly "intertwined" nature of the guilty pleas and sentence, PCR counsel now maintained Simmons should get a new trial as a result. (App'x p. 116). Conversely, the State argued Simmons's guilty pleas were voluntarily entered and, as a result, his PCR application should be denied. (App'x pp. 117-118).

Ultimately, upon considering the matter, the PCR judge found Simmons's guilty pleas were indeed voluntarily entered. (App'x p. 120). In reaching that conclusion, the PCR judge pointed to the colloquy that occurred during the plea hearing, credited defense counsel's testimony, and found Simmons's decision to enter the plea was motivated by his desire to avoid a potential life without parole sentence, have some of his charges dismissed, and potentially receive a sentence as low as seventeen years. (App'x p. 120; pp. 137-138). However, the PCR judge further determined Simmons's sentence was, in fact, illegal because the statutory language

in Section 16-11-330 of the South Carolina Code of Laws prohibited any portion of an armed robbery sentence—like Simmons's—from being suspended. (App'x p. 125; pp. 139-140). Based on that determination, the PCR judge found Simmons was entitled to the "very specific" relief of resentencing. (App'x pp. 120-121). Accordingly, he vacated Simmons's sentence and remanded the matter for the limited purpose of resentencing within the negotiated sentencing range. (App'x p. 121; p. 125; p. 129; pp. 140-141). Meanwhile, the PCR judge denied relief as to all other claims. (App'x pp. 129-131; pp. 133-139; p. 141).

Following that, Simmons did *not* appeal, and a resentencing hearing was conducted before the plea judge in accordance with the PCR judge's remand order. (App'x p. 142; p. 144). Ultimately, at the conclusion of that hearing, the plea judge sentenced Simmons to an aggregate twenty-eight-year term of imprisonment for the armed robberies, which was a permissible sentence pursuant to the plain terms of the plea agreement Simmons had entered. (App'x p. 4; pp. 15-16; p. 163). Following that, no objections of any kind were raised, and Simmons's revised sentence was subsequently confirmed in a written sentencing order. (App'x p. 164; pp. 166-167).

ARGUMENT

The PCR judge did not err by declining to grant a new trial to Simmons because Simmons's guilty pleas were validly and voluntarily entered and were not—and could not have been—retroactively rendered involuntary by defense counsel's failure to object to the sentence imposed, by defense counsel's failure to move for the guilty pleas to be withdrawn, or by anything else.

Standard of Review

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Moreover, when conducting such an analysis in the context of a PCR appeal involving a guilty plea issue, the appellate court will consider the entire record, including the transcript from the guilty plea hearing and the evidence presented at the PCR hearing, because the voluntariness of a guilty plea must be determined from an examination of the record as a whole. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420-421 (2000); see State v. Tucker, 376 S.C. 412, 419, 656 S.E.2d 403, 407 (Ct. App. 2008) ("An appellate court will review the totality of the circumstances to discern if a plea was entered into knowingly and intelligently."). Ultimately, if

the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Law Regarding the Voluntariness of a Guilty Plea

As has long been recognized, guilty pleas and plea bargains are important components of our nation's—and state's—criminal justice system. Blackledge v. Allison, 431 U.S. 63, 71 (1977). Such pleas provide significant benefits to all involved, including by allowing defendants to obtain speedy disposition of their cases and by allowing both courts and prosecutors to conserve limited resources. Id. Critically though, the benefits of a guilty plea can only truly be secured "if dispositions by guilty plea are accorded a great measure of finality." Id. In light of that, "[f]ew principles of South Carolina criminal law are as ingrained as the notion that a knowing, voluntary, and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Sims, 423 S.C. 397, 400, 814 S.E.2d 632, 633 (Ct. App. 2018) (citation and internal quotations omitted).

For a guilty plea to be knowing, voluntary, and intelligent, all that is required is: (1) the defendant must have a sufficient understanding of the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights being waived; and (2) the record must reflect a factual basis for the plea. Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001); see Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) ("[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." (emphasis removed)); Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) ("To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of the plea and the charges against him.").

Significantly though, "the Constitution, in respect to a defendant's awareness of relevant circumstances, does *not* require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." United States v. Ruiz, 536 U.S. 622, 630 (2002) (emphasis added). In the end, "[t]he 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." McMillian v. State, 383 S.C. 480, 485, 680 S.E.2d 905, 907 (citation and internal quotations omitted).

Law Applicable to Ineffective Assistance of Plea Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). However, that does not mean entitlement to perfect or mistake-free representation. Burt v. Titlow, 571 U.S. 12, 24 (2013). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Meanwhile, counsel's assistance is considered constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient

performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). To establish deficiency, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Thus, counsel's performance will be considered deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Furthermore, when an applicant is raising a challenge to a guilty plea predicated upon an ineffective assistance of counsel claim, the same two-pronged analysis remains applicable. Hill v. Lockhart, 474 U.S. 52, 58 (1985). "In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). Meanwhile, to establish prejudice in the context of a guilty plea, the applicant must demonstrate there was a reasonable probability the applicant would not have pled guilty and, instead, would have insisted on going to trial but for plea counsel's errors. Hill, 474 U.S. at 59; see Jones v. State, 333 S.C. 6, 8, 507 S.E.2d 324, 325 (1998) ("A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty."). Significantly, due to the finality interests at stake, caution must be exercised before a guilty plea is set aside in a case in which a proper plea colloquy was conducted. Jamison v. State, 410 S.C. 456, 468-469, 765 S.E.2d 123, 129 (2014).

Application of the Pertinent Law to Simmons's Case

In the case sub judice, Simmons contends the PCR judge reversibly erred by declining to grant him a new trial during his first PCR action. As support for that contention, Simmons asserts the sentence he originally received—a term of imprisonment of thirty years suspended to eighteen years of "active time"—did not fall within the negotiated sentencing range of seventeen to twenty-eight years that had been agreed upon by the parties. And, based on that, Simmons maintains his defense counsel's performance was constitutionally ineffective because defense counsel neither objected to the sentence imposed nor moved to withdraw the guilty pleas following the imposition of the sentence. Furthermore, Simmons maintains resentencing—

which he has, in fact, now obtained and which has resulted in him now having an aggregate sentence falling squarely within the negotiated sentencing limits—was not the appropriate remedy for what occurred in his case because "PCR counsel argued that the guilty plea was rendered involuntary." (App'x p. 8). Thus, Simmons now appears to be contending his voluntarily-entered guilty pleas were somehow *retroactively* rendered involuntary by how he was subsequently sentenced and by defense counsel's response—or lack thereof—to the sentence imposed. Contrary to those contentions, the PCR judge correctly declined to grant Simmons a new trial because Simmons's guilty pleas were, in fact, voluntarily entered, and Simmons suffered no prejudice from defense counsel's actions—even if they were somehow deficient—because Simmons has since been resentenced to a term of imprisonment falling within the agreed-upon sentencing range.[11]

Initially, demonstrating the voluntariness of Simmons's guilty pleas, Simmons was aware of everything he needed to be aware of to be able to enter valid guilty pleas prior to entering his. Specifically, as reflected in the record, he knew and understood the nature of the charges to which he was pleading guilty, including the potential penalties that could be imposed—both in general and in light of the plea agreement that had been reached—for those offenses. Likewise,

[11] Moreover, because Simmons's current appellate arguments are *very* different from the arguments actually identified in Simmons's PCR applications, raised at the evidentiary hearing, and ruled upon by the PCR judge, Simmons's current arguments do not appear to be properly preserved for appellate review. See Mangal v. State, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017) (recognizing issue preservation requirements apply in the context of PCR cases, instructing there are *some* situations in which the interests of justice require a court to be "flexible" with those requirements in a PCR case, and declining to excuse Mangal's procedural default since the issue he wanted addressed was not properly raised or supported); see also State v. Williams, 439 S.C. 620, 623, 889 S.E.2d 562, 563 (2023) (emphasizing appellate courts are courts of review as opposed to of first view and declining to consider a matter "[t]he trial court never had the chance to consider" when conducting appellate review); cf. Fishburne v. State, 427 S.C. 505, 518, 832 S.E.2d 584, 590 (2019) (Hearn, J., concurring) ("[I]n most instances where a party fails to file a Rule 59(e) motion when required to do so, we will find the issue unpreserved and decline to address the merits.").

Simmons—who had preexisting experience with the criminal justice system—confirmed he understood all the constitutional rights he was waiving by pleading guilty along with the "major benefit" he was receiving by virtue of entering his guilty pleas.[12] Furthermore, there was unquestionably a factual basis for the offenses to which Simmons pled guilty, and Simmons personally affirmed to the plea judge on several different occasions during the plea colloquy he was truly guilty of the armed robberies.[13] See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("[T]he representations of the defendant, his lawyer, and the prosecutor at [a guilty plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."). And, after all that was established, Simmons directly confirmed he wanted the plea judge to accept his guilty pleas, and only then did the plea judge do so.

Under such circumstances, Simmons knew of and confirmed all that was necessary for him to be able to validly plead guilty. See Rollison, 346 S.C. at 511, 552 S.E.2d at 292 ("All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea."); Roddy, 339 S.C. at 34, 528 S.E.2d at 421 ("In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. . . . Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel,

[12] During the plea hearing, the solicitor noted Simmons had past convictions for a number of different offenses. (App'x p. 8).

[13] Indeed, Simmons at one point expressly acknowledged there was "no question" he was guilty. (App'x p. 26).

or both." (citations and internal quotations omitted)). As a result, Simmons's guilty pleas were voluntary and valid ones, and, critically, that remained true regardless of whether the manner in which the plea judge structured Simmons's sentence did or did not violate the terms of the plea agreement, which was something that potentially could have constituted an error requiring a remedy—like the one Simmons has since obtained by virtue of being resentenced—but was *not* something that impacted the voluntariness of the already-entered guilty pleas. See Puckett v. United States, 556 U.S. 129, 137 (2009) (explaining "it is entirely clear that a breach [of a plea agreement] does not cause the guilty plea, when entered, to have been unknowing or involuntary" and instructing there is nothing to support the proposition a breach of a plea agreement "retroactively causes the defendant's agreement to have been unknowing or involuntary"); cf. United States v. Collins, 986 F.3d 1029, 1034 (7th Cir. 2021) ("[B]ecause any breach occurred at sentencing, nothing can establish that the Government's breach of a plea agreement retroactively caused the defendant's agreement to have been unknowing or involuntary." (citation, brackets, and internal quotations omitted)).

Meanwhile, to the extent Simmons is now contending defense counsel's performance entitled him to a new trial, he is wrong for several reasons. First, as to his claim defense counsel should have objected to the sentence imposed, Simmons did not suffer—and could not possibly establish he suffered—any prejudice as a result of defense counsel's failure to object because, even without an objection being raised, Simmons was granted the same relief he could have obtained through such an objection, which was resentencing to a legal sentence that fell within the agreed-upon sentencing limits. See Strickland, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); cf. Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850,

852 (2010) ("Because Petitioner's only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense."). Second, as to his claim defense counsel should have moved to withdraw the pleas, nothing that occurred during the plea hearing suggested Simmons had any desire to withdraw his guilty pleas after he was sentenced, and Simmons likewise did not present anything during the PCR evidentiary hearing to support such a desire actually existed on his part. Cf. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (concluding defense counsel was deficient for failing to move to withdraw Rolen's guilty plea *because* "it was clear that [Rolen] wanted to withdraw his guilty plea"). Under such circumstances, defense counsel could not have performed deficiently by not seeking withdrawal of the guilty pleas when Simmons himself had already unequivocally indicated he wanted them to be accepted and had done nothing subsequent to that to suggest his position on the matter had changed, and, relatedly, nothing was presented to support a conclusion Simmons—who, based on his own testimony during the evidentiary hearing, truly desired *dismissal of his charges* as opposed to a trial—suffered any prejudice from defense counsel's failure to seek such unrequested relief.[14] See Commonwealth v. Velasquez, 563 A.2d 1273, 1275 (Pa. Super. Ct. 1989) (explaining counsel

[14] Importantly, even if Simmons's current claim concerning defense counsel's failure to move to withdraw the by-then-accepted guilty pleas was somehow correct, the proper relief would merely be a remand to the point in the guilty plea proceeding in which defense counsel should have made such a motion. See United States v. Morrison, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."); cf. Rolen, 384 S.C. at 414, 683 S.E.2d at 474 ("[W]e hold that counsel was ineffective for failing to move to withdraw [Rolen]'s guilty plea. However, we find that granting [Rolen] the relief of an entire new plea hearing is inappropriate. Once the plea judge found that [Rolen]'s plea was voluntary and supported by a factual basis and formally accepted the plea of guilt, [Rolen] forfeited his ability to withdraw the plea as a matter of right. Accordingly, we remand the case to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea. In our view, this tailored relief remedies the precise prejudice resulting from plea counsel's deficient performance." (citations omitted)).

cannot "be deemed ineffective for failing to do what he was not requested to do"); see also Hill, 474 U.S. at 59 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that 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.").

For all those reasons, the PCR judge correctly declined to grant a new trial to Simmons under the circumstances involved and correctly limited the relief granted to resentencing, which was sufficient to remedy—and has now, in fact, remedied—any issues with the length or structure of Simmons's aggregate sentence. See State v. Petty, 245 S.C. 40, 42, 138 S.E.2d 643, 645 (1964) ("In the case of an illegal sentence, the well settled practice in this jurisdiction is to *affirm the conviction* but set aside the sentence and remand the case to the trial court for the purpose of resentencing the defendant." (emphasis added)); see also Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."); cf. Collins, 986 F.3d at 1034 ("When a remedy is warranted for breach of a plea agreement's term on a sentencing recommendation, our 'usual course' is to remand for resentencing (as opposed to allow a plea withdrawal).").

Simmons's petition for a writ of certiorari pursuant to Austin v. State should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari pursuant to Austin v. State should be denied.

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