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September 9, 2013

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S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Jerry Whitfield v. State of South Carolina
Appellate Case No.: 2012-212925
Lower Court Case No: 2010-CP-04-2913

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Carmen V. Ganjehsani, Esq. (2 copies with all the attachments)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2012-212925

Jerry Whitfield, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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S.C. Supreme Court

TABLE OF CONTENTS

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW5

ARGUMENTS.....6

Certiorari is not warranted where evidence of probative value supports the PCR court’s ruling that Petitioner failed to prove his plea was involuntarily rendered because he was not advised of the nature and elements of the offenses.
.....6

Certiorari is not warranted where the PCR court correctly ruled Petitioner knowingly, intelligently, and voluntarily pled guilty to armed robbery based upon indisputable evidence. Additionally, the PCR court correctly found there was a factual basis for the armed robbery plea where the solicitor’s comments only concerned sentencing.
.....10

Certiorari is not warranted where the PCR Court correctly ruled Petitioner failed to prove counsel was ineffective for failure to investigate surveillance recordings that were collateral to his defense where the argument rested mere speculation.
.....12

CONCLUSION.....14

QUESTION PRESENTED

1. Did the PCR court correctly rule Petitioner failed to prove he entered an involuntary guilty plea based on the assertion he was not advised of the elements of the offenses?
2. Did the PCR court correctly rule Petitioner failed to prove he entered an involuntary guilty plea based on the assertion he was not aware he was pleading guilty to armed robbery based on the solicitor's comments during the sentencing phase of the plea hearing?
3. Did the PCR court correctly find Petitioner failed to prove counsel was ineffective for failure to investigate a surveillance recording of the offense?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at the March 2007 term of the Grand Jury of the Court for Criminal Sessions of Anderson County for armed robbery (2007-GS-04-980) and criminal conspiracy (2007-GS-04-982). (App.p.87-92). On December 15, 2009, Petitioner pled guilty to both charges as indicted.¹ Andrew Potter, Esq., represented Petitioner. (App.pp.1-6). Pursuant to the State's recommendation, the Honorable J. Cordell Maddox sentenced Petitioner to ten (10) years imprisonment for armed robbery and five (5) years for criminal conspiracy. The sentences were to be served concurrently. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed an Application for post-conviction relief (PCR) on August 17, 2010. (App. pp.10-8). A hearing was convened at the Anderson County Courthouse on June 5, 2012. (App. p. 24-73). Petitioner was present and represented by Teresa Nesbitt Cosby, Esq. Kaelon E. May, Esq., of the Office of the Attorney General represented Respondent.

At the PCR hearing, Petitioner alleged that his plea was rendered involuntary based upon ineffective assistance of counsel. (App.p.26, lines 21-4). Specifically, Petitioner alleged that Counsel failed to sufficiently advise Petitioner of the elements constituting the crime of armed robbery, and that the facts of his case were insufficient to support a conviction for armed robbery. (App.p.27, lines 1-7). Additionally, Petitioner alleged that Counsel was ineffective for failing to review a surveillance tape.

¹ At the plea hearing, plea counsel testified to his recollection that Petitioner was also charged with ABWIK, and that the State dismissed that charge. (App.p.53, lines 14-16). Respondent has no further record of such charge or its dismissal.

(App.pp.57-68; p.69). Additionally, Petitioner alleged that the plea colloquy failed to establish that Petitioner made a knowing, voluntary, and intelligent plea. (App.p.27, lines 8-12).

The Honorable Alexander S. Macaulay denied relief in an order dated August 16, 2012. (App.pp.75-84). The PCR court ruled accordingly: (1) that Petitioner was advised of the elements of armed robbery and conspiracy, and that he was fully aware of the facts constituting armed robbery; (2) that overwhelming evidence showed Petitioner entered a knowing and voluntary guilty plea; and (3) that Petitioner failed to produce the surveillance video or offer any other evidence to show the outcome of the case would likely have been different had counsel investigated the matter. (App.pp.81-3). The Petition for Writ of Certiorari before this Court followed.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The Court should reverse the PCR judge's decision only when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 465 (2004).

ARGUMENT

I.

Certiorari is not warranted where evidence of probative value supports the PCR court's ruling that Petitioner failed to prove his plea was involuntarily rendered because he was not advised of the nature and elements of the offenses.

At the plea hearing, counsel told the plea court he advised Petitioner of the elements of the offenses. (App.p.5). Petitioner told the plea court he desired to plead guilty immediately after counsel ensured the plea court Petitioner was advised of and intelligently comprehended the elements of armed robbery and conspiracy. (App.p.5). The plea court accepted Petitioner's plea and sentenced him accordingly. (App.pp.6-7).

At the PCR hearing, Petitioner argued his plea was rendered involuntary because the plea court did not explain the elements of armed robbery, and where further counsel was deficient for neglecting to provide sufficient advice. (App.p.39). Petitioner testified he did not discuss the version of the facts of events that led to his arrest with counsel and that counsel misadvised him he was culpable as an accomplice for the armed robbery charge. (App.p.42). Counsel testified he discussed Petitioner's version of the facts, the charges, the State's evidence against Petitioner, and potential defenses with him. (App.p.39). Counsel testified that Petitioner insisted he planned the commission of the offense, provided entry into the eatery to a confederate, and was present when the mananger was held at gunpoint, robbed, and shot. (App.p.42). Counsel testified Petitioner comprehended the seriousness of the offense and the nature of the charges. (App.p.47).

The PCR Court found overwhelming evidence showed Petitioner was advised of the elements of offenses when he entered his plea.

Before this Court, Petitioner argues that the record contains no evidence in support of the PCR court's finding that Petitioner understood the elements of both armed robbery and criminal conspiracy such that his plea was rendered involuntary. Respondent submits evidence of probative value more than adequately supports the PCR court's ruling here. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

"A defendant's plea is knowingly and voluntarily made where the record establishes that a PCR applicant had a full understanding of the consequences of his plea and the charges against him." Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). "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.” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)).” In the present case, the record shows plea counsel advised Petitioner of the crucial elements of the offenses. Although counsel did not have a precise recollection of reviewing each element of each offense in great detail with Petitioner, counsel’s testimony more than adequately supported the PCR court’s finding that counsel diligently advised Petitioner on the matter. Counsel discussed the charges, Petitioner’s version of the facts of the offense, the State’s evidence, and potential defenses with him. Moreover, counsel referenced written memorializations of the consultations.

Additionally, counsel told the plea court he had adequate time to ensure Petitioner was advised of nature and elements of the offense. See Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984) (In determining guilty plea issues, it is proper for the Court to consider the guilty plea transcript as well as evidence presented at the PCR hearing.). Petitioner ensured the plea court he was satisfied with counsel and did not refute counsel’s assertion he was advised of and comprehended the elements of the offenses. See Blackledge v. Allison, 431 U.S. 63 (1977) (“Because a guilty plea is solemn, judicial admission of the truth of the charges against an individual, a defendant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.”).

Furthermore, Petitioner’s allegation solely rested upon his speculative testimony. Notably, Petitioner’s terse testimony lacked credibility. Petitioner testified counsel never discussed Petitioner’s version of the facts of the offense in contrast to counsel’s testimony that was corroborated by his memorializations and the plea hearing transcript.

Furthermore, Petitioner's argument relies on an unsound burden shift. The controlling decisions indicate that no specific inquiry by the plea judge is mandated for a guilty plea, and the plea judge is not required to direct the defendant's attention to each and every right and obtain a separate waiver as to each as long as the entire record, including the plea transcript and all evidence presented at the post-conviction relief hearing, indicates the defendant was aware of the consequences of the plea. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). In the present case, the PCR Court examined the record as a whole in finding Petitioner failed to meet his burden of proof. Simply, the record in its entirety provides ample evidence of probative value that Petitioner knowingly and voluntarily pled guilty pursuant to being advise of the nature and crucial elements of the offense. Therefore, certiorari is not warranted.

II.

Certiorari is not warranted where the PCR court correctly ruled Petitioner knowingly, intelligently, and voluntarily pled guilty to armed robbery based upon indisputable evidence. Additionally, the PCR court correctly found the solicitor presented a factual basis for the armed robbery plea where her comments only concerned sentencing.

First, Respondent submits that Petitioner's argument is wholly without merit. At the plea hearing, Petitioner was apprised the plea hearing concerned the disposition of the armed robbery and conspiracy indictments. (App.p.3). Petitioner ensured the plea court he understood the solicitor's recommendation, the discretionary nature of the recommendation, and the maximum exposure he faced. (App.pp.4-5).

At the PCR hearing Petitioner testified he understood he was pleading guilty to both armed robbery and conspiracy at the time of the plea hearing. (App.p.41). Counsel testified a nol prosee to armed robbery was "never on the table." (App.p.53, lines 11-6). Furthermore, counsel thoroughly recounted plea negotiations. (App.pp.51-3). Thus, this argument is facially without merit.

Second, Respondent submits Petitioner's assertion his guilty plea was rendered invalid because the solicitor told the plea court Petitioner was not guilty of armed robbery was unpreserved and is without merit. At the plea hearing, the plea court accepted Petitioner's plea. During the sentencing phase of the plea hearing, the solicitor commented her favorable recommendation was made because Petitioner was morally less culpable than his confederate who forcibly took money from the manager at gunpoint. (App.p.7). At the PCR hearing, Petitioner testified the comment negated his guilt for

armed robbery. Counsel testified the comment related to sentencing and did not negate the factual basis for the armed robbery conviction. (App.p.60). At the close of the PCR hearing, the PCR Court summarily dismissed the allegation and found that a factual basis supported Petitioner's guilty plea. (App.p.68). The issue was not addressed in the PCR court's order of dismissal.

First, the issue is not preserved for this Court's review. See Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C. 1992) (issue must be raised and ruled on by the PCR judge in order to be preserved for review); see also Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review....").

Second, the argument is unconvincing on its merits. In Lopiano v. State, this Court held, "[s]ince we have determined that LoPiano's plea was entered voluntarily and understandingly, he does not now have the right, in post-conviction proceedings, to attack the plea upon the ground that the facts were insufficient to establish the offense to which he pled." LoPiano v. State, 270 S.C. 563, 569, 243 S.E.2d 448, 451 (1978). For reasons announced above, the PCR Court correctly found Petitioner knowingly, intelligently, and voluntarily pled guilty. Furthermore, the record is replete with instances to establish the factual basis for the armed robbery conviction. Petitioner testified he planned the offense and was present and aided in its commission. Therefore, certiorari is not warranted.

III.

Certiorari is not warranted where the PCR Court correctly ruled Petitioner failed to prove counsel was ineffective for failure to investigate surveillance recordings that were collateral to his defense where the argument rested upon only mere speculation.

At the PCR hearing, Petitioner argued counsel failed to investigate a video recording from the commission of the offense. Counsel testified an investigation into the matter would have been unreasonable because Petitioner admitted his guilt on the conspiracy charge. (App.p.58). Petitioner also told counsel he was present during the commission of the offense along with acting in furtherance of the armed robbery when he secured his confederate's entry into the eatery. (App.p.49; p.55). Counsel testified Petitioner's defense that his involvement in the offense did not equate to guilt as an accomplice would have hinged on a jury question regarding the credibility of witnesses. (App.p.49). Petitioner's confederates made statements to the police regarding his involvement and culpability. (App.pp.55-6). The principle confederate pled guilty prior to Petitioner's plea hearing. (App.p.6). Counsel testified the investigation of the surveillance recording would have yielded no benefit to Petitioner's defense. (App.p.57). The confederate who drove the getaway vehicle and who was not present in the eatery made a statement against Petitioner. (App.p.56). The PCR Court agreed with counsel and found the surveillance recording would not have been beneficial to Petitioner's case.

Evidence of probative value supports the PCR court's ruling that Petitioner failed to prove counsel was deficient for not investigating the surveillance recording. "Counsel has a duty to undertake reasonable investigations or to make a decision that renders a

particular investigation unnecessary.” Taylor v. State, 404 S.C. 350, 745 S.E.2d 97, 104 (2013) (citing Strickland, 466 U.S. at 691, 104 S.Ct. 2052. “Counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment.” Id. (citing Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)). Based upon Petitioner’s version of the facts of the offense, counsel executed a valid defense strategy that challenged the extent of Petitioner’s involvement. Petitioner’s confederates pled guilty and made damaging statements against Petitioner. Because not all of the confederates were present in the eatery when the manager was shot and robbed, the surveillance recording would have provided Petitioner no benefit in challenging the credibility of at least one, if not more, of the statements against him. Thus, the PCR court correctly found Petitioner failed to prove deficiency.

Additionally, the PCR court correctly found Petitioner failed to meet his burden to prove Strickland’s prejudice prong. “Where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.” Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009). Petitioner failed to produce evidence to support the argument. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”). Although the availability of the surveillance recording was called into question at the PCR hearing,

Petitioner failed to produce evidence from the solicitor's scanned file that even suggested the recording would have benefited Petitioner's defense. (App.p.57). Therefore, certiorari is not warranted.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR Judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

Apr. 9th, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

JERRY WHITFIELD,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

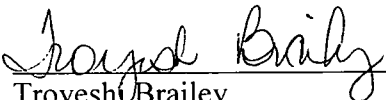
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Carmen V. Ganjehsani, Esq.
1330 Lady St. Suite 401
Columbia, SC 29201

This 9th day of September, 2013


Troyesh Brailey
LEGAL ASSISTANT for the Respondent