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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Honorable Jocelyn J. Newman, Circuit Court Judge
Appellate Case No. 2024-000233

KEVIN LAWRENCE PEARSON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

AMBREE M. MULLER
S.C. Bar No. 104213
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3747

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

I. **The post-conviction relief court properly found that Petitioner's guilty plea was not coerced and therefore voluntarily given.**

II. **The PCR court did not err in concluding that Petitioner received effective assistance of counsel because Petitioner did not allege ineffective assistance of counsel for not withdrawing his guilty plea in his application to the court nor did he allege that at the PCR hearing and therefore is not preserved.**

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

In August 2019, the Lexington County Grand Jury indicted Kevin Pearson (Petitioner) for murder. Dave Mauldin, Esquire, represented Petitioner. On November 21, 2019, Petitioner entered a negotiated guilty plea to the lesser included offense of voluntary manslaughter for a twenty-five-year sentence. Petitioner filed a timely PCR application on November 20, 2020. On June 16, 2021, the State made its return and motion for a more definite statement. On May 25, 2022, Petitioner filed an amendment to his PCR application. On June 8, 2022, a hearing was held on the matter before the Honorable Jocelyn J. Newman. On October 27, 2023, Judge Newman signed an order denying PCR. Petitioner filed a Petition for Writ of Certiorari on November 21, 2024. This return follows.

RELEVANT FACTS

On February 8, 2017, at approximately 11:17 AM, law enforcement received a 911 call regarding a shooting. (App. 13). The caller reported that the suspect was driving a Honda Accord and provided the tag number. (App. 13–14). The caller also reported that a dog was in the vehicle. The tag came back registered to Petitioner's sister. (App. 14).

When law enforcement questioned the sister, she indicated her brother had just dropped off the dog and car. (App. 14, 24). She stated that Petitioner told her he "had done something bad." (App. 14). Petitioner's mother also told law enforcement that he left that morning with the dog in her daughter's car. (App. 14, 24). An eyewitness later identified Petitioner as the individual who shot Rodney Isaac, the victim in the incident. (App. 14).

Petitioner's cell phone and Facebook records indicated that Petitioner believed Rodney was involved in a drive-by shooting where Petitioner was shot in the throat. (App. 24). Because Petitioner was unable to talk at the time, he sent messages while he was in the hospital putting hits out on Rodney. (App. 24). Some of the text messages had Rodney's name listed and his grandmother's address, where the shooting occurred. (App. 24). Rodney stayed at his grandmother's house the night before he died. (App. 24). Petitioner is a validated gang member. (App. 25). Law enforcement recovered multiple incriminating text messages. (App. 25–26). Petitioner was also on the run for approximately sixteen months after the shooting. (App. 26).

ARGUMENT

I. The post-conviction relief court properly found that Petitioner's guilty plea was not coerced and therefore voluntarily given.

Petitioner contends that the PCR court erred in denying Petitioner's claim his guilty plea was coerced where counsel admitted the judge took the solicitor's side and strongly suggested Petitioner accept the plea offer. Further, Petitioner alleges this affected his decision to plead guilty. Petitioner's argument is without merit because the plea judge did not coerce Petitioner into taking a plea but thoroughly made sure he understood the risks and rewards of the decision he was making. The plea transcript reflects Petitioner entered his plea knowingly and voluntarily, engaged in an intelligent colloquy with the plea court, and gave appropriate responses to the court's questions.

The Plea Hearing

Petitioner was transported to the courthouse on November 21, 2019. The solicitor put on the record that she had extended a plea offer of "a negotiated plea to 25 years on voluntary manslaughter," and that she and defense counsel had agreed on a plea offer, so the plea was scheduled for that day. (App. 3). The solicitor stated she "was told that the defendant has changed his mind again and is now rejecting that plea offer and wishes to fire his attorney." (App. 3). The solicitor made it clear that the offer expired today and would not be extended in the future. (App. 4). The court asked Petitioner if he was rejecting the offer and Petitioner stated he had not agreed to the offer in the first place. (App. 5). The following conversation transpired:

> **The Court**: If they pull this offer today, Mr. Pearson, I just want you to be totally, totally clear on what's gonna happen. You will be looking at going to trial for murder. It is entirely possible that if you are convicted of murder, the penalty in that case is 30 years to life, okay, sir? You would have to serve that day for day.
> **Petitioner**: Yes, sir.
> **The Court**: A voluntary manslaughter conviction you'd have to serve 85 percent of whatever it is that you get convicted of, okay?

Petitioner: Yes, sir.
The Court: So 85 percent is what you would have to serve. It's entirely possible that the Court may conclude that you are entitled to a lesser included charge of voluntary manslaughter or maybe even an involuntary manslaughter. I don't know if that's something you've talked to your lawyer about. Could be that you're entitled to a self defense charge. Could be that you're entitled to the defense of accident or for that matter suicide, all right? But you understand, Mr. Pearson, what I'm getting at is that you're gonna be between a rock and a hard place going forward if you choose to decline to accept this offer. Do you understand that?
Petitioner: Yes, sir.
...
The Court:...There are risks and rewards to every action that you choose to take. I've got a very simple question for you. Do you want to plead guilty to voluntary manslaughter and received a guaranteed 25 year sentence or would you rather go to trial and see what happens at trial? What's your choice?
Petitioner: I would rather to go to plea.
The Court: You would rather go to plea?
Petitioner: Yes, sir.
The Court: Okay. That's the best it's gonna get is 25 years. You want the 25 years or no?
Petitioner: Yes, sir.

(App. 6-8). Thereafter an extensive plea colloquy occurred in which Petitioner affirmed he wanted to waive his rights and plead guilty. (App. 9-21).

The PCR Hearing

At the PCR hearing, Petitioner testified that he felt coerced during the guilty plea proceeding. He testified that he wanted a new attorney, and the judge denied that "and he told me it's 25 years, the best thing. And he basically was like, yeah, take this 25 years or you going to get this 30 right now today—you going to have no choice." (App. 64). He further testified that it was coercive when the court indicated that he couldn't get a better offer if he got someone else to represent him and his attorney didn't do anything to correct that or try to withdraw his plea. (App. 64-65). On cross examination, the State clarified with Petitioner whether he heard the solicitor state that she would not be extending a better offer than what was currently being offered. (App. 65-66).

Trial counsel testified that in October of 2019, he had discussed a plea offer of a range of 25-30 years on a voluntary manslaughter charge and that Petitioner indicated he would only take 15-20. (App. 71-72). Trial counsel further testified that on November 7, 2019, Petitioner was going to reject that offer and the solicitor gave a final offer of 25 years and Petitioner wanted a day to think about it. (App. 72). Trial counsel testified that there was some back and forth before the plea offer on November 21, 2019, but Petitioner ultimately pled guilty. (App. 73). Trial Counsel further testified that Petitioner did not express that he felt coerced by the Judge, just that "he wasn't happy about it all, but he kind of understood that the state made that offer and his alternative was going to trial where the minimum would be 30 and the maximum would be life." (App. 74). Trial Counsel stated that he felt the 25-year plea was in Petitioner's best interest. (App. 75).

On cross examination, Petitioner questioned trial counsel about the statement made by the judge about not receiving a better offer. (App. 77). Trial counsel stated "Yes. And again, as I said on direct, I believe that statement was made because the solicitor said if he does not take the 25-year plea today, that the plea offer will not be better than murder—which is 30 to life, which is not a better option." (App. 77-78).

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a

plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. Id. at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir.) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, the defendant "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). The 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, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his guilty plea, the plea judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the plea judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The 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." North Carolina v. Alford, 400 U.S. 25, 31 (1970). It is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

"Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977); see also Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." Dalton, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); cf. Blackledge, 431 U.S. at 73–74 (pointing out that representations made by a 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").

The voluntariness of a guilty plea, however, "is not determined by an examination of the specific inquiry made by the sentencing judge alone but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v.

Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. 357, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." Lee, 582 U.S. 357, 137 S. Ct. 1958. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id. Thus, in determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The PCR court found that the combined record from the plea hearing and the PCR hearing establishes Petitioner freely, knowingly, and voluntarily plead guilty. "Sound advice by counsel does not constitute coercion merely because it is unpleasant to hear." Davis v. State, 754 S.W.2d 593, 594 (Mo. Ct. App. 1988). The presiding Judge's statement to Petitioner that he has received the best possible offer because he would face the higher charge of murder at trial and that he could

be sentenced to life at trial is not "coercion" despite Petitioner's characterization of it as such. *See* Tollett v. Henderson, 411 U.S. 258, 268 (1973) (explaining that the prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea). As then-Judge Burger explained in Brown v. United States:

> A lawyer has a duty to give the accused an honest appraisal of his case. This is commanded in part because without it the accused cannot make an informed judgment as to whether he should enter a plea of guilty—a course of action frequently to the advantage of an accused. The constitutional right to counsel does not mean counsel who will be optimistic in his private appraisal of the evidence and his advice to the accused. Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism.

264 F.2d 363, 369 (D.C. Cir. 1959) (en banc) (Burger, Circuit Justice, concurring in part).

Further, a trial judge may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion. See Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981). In Harden, Appellant alleged he felt coerced by the time pressure and that the proposed sentence range originated with the trial judge. Id. The court held that while there was some indication of time pressure, that evidence fell short of proof that the judge himself actually took affirmative role in pressuring Appellant. Furthermore, the court held that the record in the case was sufficient evidence to support that no direct coercion by the trial judge occurred. Id. Similarly, in this case, the judge took no part in the actual plea negotiations. The solicitor made an offer and communicated that offer to the court and stated that there would be no other offer. The Judge repeated that to Petitioner and made sure he understood that he would not get another offer because that's what the solicitor had said not because he was trying to coerce him that there was not a better offer he could take. He explained what would happen if he did not take the offer and simply informed Petitioner of all of the risks and rewards of taking the offer.

The PCR court found Petitioner's claim of coercion is wholly without merit, particularly in light of his solemn declarations on the record at the plea hearing that no one promised him anything or held out any hope of reward to get him to plead guilty; no one threatened or used force to get him to plead guilty; no one used any pressure or intimidation to cause him to plead guilty; and that he was pleading guilty of his own free will and accord. (App. 101). While Petitioner now claims he was coerced into entering a guilty plea, he made it clear to the plea court that the decision to plead guilty was his own. The PCR court further found that "the plea transcript reflects [Petitioner] understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily." (App.102). In its order of dismissal, the PCR court cited to Wolfe v. State, that held counsel's statement to defendant that the plea court's "questions are 'routine' is not an invitation to answer them untruthfully, nor does it constitute a reason to believe the questions and statements of the judge during a guilty plea proceeding mean nothing." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). Lastly, the PCR court held that Petitioner failed to present any valid reason why he should be able to depart from the truth of the statements he made during his plea proceeding. (App. 102-103).

II. The PCR court did not err in concluding that Petitioner received effective assistance of counsel because Petitioner did not allege ineffective assistance of counsel for not withdrawing his guilty plea in his application to the court nor did he allege that at the PCR hearing and therefore is not preserved.

Petitioner argues the PCR court erred in concluding Petitioner received effective assistance of counsel where counsel admitted the judge took the solicitor's side and strongly suggested Petitioner should accept the plea offer, but where counsel failed to object and move to withdraw the plea, since the judge may not inject his personal opinion into that decision nor make inaccurate statements of law. There are many issues with this argument. First, Petitioner has misconstrued the facts of the PCR hearing. Trial counsel did not "admit the judge took the solicitor's side and

strongly suggested Petitioner should accept the plea offer." (Petitioner for Writ of Certiorari p. 12). Trial counsel stated that Judge Addy reiterated what the solicitor had said and changed his mind because while he was not happy with the decision, he understood that the state made that offer and his alternative was going to trial where the minimum would be 30 and the maximum would be life. (App. 74). Second, while Petitioner did allege ineffective assistance of counsel, he did not allege ineffective assistance of counsel for not withdrawing his guilty plea in either his application for PCR nor in the PCR hearing and is therefore not preserved for this court to review. Further, even if it was preserved for review, Petitioner has not met his burden in showing that he was prejudiced by trial counsel not moving to withdraw the plea.

Withdrawal of a guilty plea is generally within the sound discretion of the trial court. State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982). A criminal defendant's failure to assert his innocence militates against withdrawal. United States v. Craig, 985 F.2d 175, 179 (4th Cir. 1993). Plea counsel may be ineffective for failing to move to withdraw a plea when a criminal defendant makes it apparent, or when counsel comes to believe, that he does not want to continue with the plea and instead wishes to proceed to trial. See e.g. Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (finding that counsel was ineffective for failing to move to withdraw a plea when the defendant requested a jury trial and repeatedly asserted his innocence during the plea hearing); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to move to withdraw a plea after the state reneged on its plea agreement).

Here, while at the beginning of the proceedings Petitioner did not seem to want to go through with the guilty plea, he made it very clear through his discussions with Judge Addy that he had changed his mind and wanted to go through with the guilty plea. Trial counsel was not ineffective in not seeking to withdraw the plea because Petitioner made no assertion that he wanted

the plea withdrawn. Further, even if trial counsel had been ineffective in not seeking to withdraw the plea, Petitioner has failed to show how he was prejudiced from counsel's failure to withdraw the plea. Petitioner never asserted his innocence of the charge. Trial Counsel testified that there was an eyewitness that identified him as the shooter, there was evidence linking him to the car the shooter was driving, as well as cell phone evidence regarding the shooting. (App. 69-70). Therefore, this court should deny Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE M. MULLER
S.C. Bar No. 104213
Assistant Attorney General

By: _____
AMBREE M. MULLER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3747

ATTORNEYS FOR RESPONDENT

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