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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2024-000751

BRANDON WILSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. The PCR court correctly found that Petitioner pleaded guilty voluntarily, knowingly, and intelligently with an awareness of the mandatory five (5) year sentence for the weapon charge where Counsel credibly testified that she explained to Petitioner the charges, possible penalties for each charge, and his constitutional rights, and Petitioner failed to overcome the strong presumption that Counsel rendered competent advice. 10

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QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF QUESTION

Was the guilty plea rendered involuntary by the fact that Petitioner was not advised that possession of weapon during the commission of a violent crime carried a mandatory five-year sentence?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

I. Whether the PCR court correctly denied relief because Petitioner failed to prove there's a reasonable probability that he would have insisted on going to trial but for Counsel's advice on the sentence for possession of a weapon during the commission of a violent crime because the determinative factor in his decision to plead guilty was his ex-girlfriend, a key-witness for his defense, changing her testimony shortly before trial which undermined his self-defense claim?

II. Whether the PCR court correctly found that Petitioner pleaded guilty voluntarily, knowingly, and intelligently with an awareness of the mandatory five (5) year sentence for the weapon charge where Counsel credibly testified that she explained to Petitioner the charges, possible penalties for each charge, and his constitutional rights, and Petitioner failed to overcome the strong presumption that Counsel rendered competent advice?

STATEMENT OF THE CASE

In April 2019, Orangeburg County Grand Jury indicted Brandon Wilson ("Petitioner") for assault and battery of a high and aggravated nature ("ABHAN") (2018-GS-38-0825) and possession of a weapon during the commission of violent crime (2018-GS-38-0826). In July 2021, the Orangeburg County Grand Jury indicted Petitioner for assault and battery in the second degree (2021-GS-38-01249) from a separate incident.

On January 24, 2022, Petitioner proceeded to a jury trial before the Honorable Maite Murphy. Petitioner was represented by Belinda Davis-Branch, Esquire, ("Counsel") and Thomas R. Sims, Sr., Esquire ("Sims"). The court convened hearing on Petitioner's pre-trial motions for immunity from prosecution under the Protection of Persons and Property Act ("Stand Your Ground") and *Jackson v. Denno* hearing. Judge Murphy denied both motions, and shortly after the jury was selected, Petitioner pleaded guilty to the indictments. Judge Murphy sentenced Petitioner to a concurrent sentence of ten (10) years provided upon the service of five (5) years, followed by three (3) years of probation for ABHAN; five (5) years for possession of a weapon during the commission of a violent crime; and three (3) years for assault and battery second degree.

On February 9, 2022, a notice of appeal was filed. On February 17, 2022, the Court of Appeals dismissed the appeal for failure to timely serve. *State v. Wilson*, S.C. Ct. App. Order dated Feb. 17, 2022. The Remittitur was sent on March 7, 2022.

On May 16, 2022, Petitioner filed an application for post-conviction relief ("PCR"). On October 20, 2022, Respondent filed its Return. On February 7, 2024, an evidentiary hearing convened before the Honorable Paul M. Burch. Assistant Attorney General Bryan T. Hall represented Respondent. Arthur K. Aiken, Esq., represented Petitioner. On April 8, 2024, Judge Burch denied Petitioner's PCR application.

STATEMENT OF THE FACTS

ABHAN and Possession of a Weapon During the Commission of a Violent Crime

At a pre-trial Stand Your Ground hearing,[1] Alexus Fludd ("Fludd"), Petitioner's ex-girlfriend, testified that on October 21, 2017, she heard a gunshot and saw LaShawn Martin ("Victim") walking (limping) back to her yard, and Petitioner had a gun in his hand. (App. 79-80). Fludd did not see the shooting. Fludd testified that Victim had a gun in his waistband, but he was not the one that was pointing it, and Victim's friend took the gun from him. (App. 81). Fludd testified that other people were arguing and saying things, but no one pulled a gun on Petitioner, and she did not see any other person with a gun. (App. 83). On cross-examination, Fludd admitted that in her initial statement to law enforcement, she did not say that Victim had a gun. (App. 86-87). Fludd also admitted that in a prior conversation during trial preparation, when asked by the solicitor if she saw Victim with a gun, she told the solicitor that Victim did not have a gun. (App. 87-88).

Shawanda Oliver, Petitioner's girlfriend at the time of the hearing, was called as a witness by Petitioner but was withdrawn. (App. 91-92). Petitioner testified that he was outside of the house he shared with Fludd, and Victim pulled into the yard in a vehicle. (App. 94; 95-96). Petitioner and Victim exchanged words, and Petitioner testified that he saw Victim raise the center console. (App. 96). Petitioner testified that Victim had a gun, opened the car door, and pointed the gun at him. (App. 96-97). Petitioner testified that he was frightened and shot a "warning shot" at Victim. (App. 97-98).

[1] Under the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-440 to -450.

The trial court denied Petitioner immunity under the Protection of Persons and Property Act, determining there were inconsistencies in Fludd's testimony regarding where the gun was located and inconsistencies regarding the location. (App. 132).

After a jury was selected, Petitioner pleaded guilty to the following facts. On October 21, 2017, Victim was in his vehicle and made a comment to Petitioner. (App. 163). When Victim stepped out of his vehicle, about fifteen (15) to twenty (20) feet away, Petitioner pulled out a gun and shot him. (App. 163). Victim did not have a weapon on him. (App. 163). Victim was shot in his thigh. (App. 163).

Assault and Battery – Second Degree

Petitioner pleaded guilty to the following facts. In a separate incident, occurring in 2021, Petitioner was at a bar in Santee. (App. 165). A fight broke out at the bar, and Petitioner broke a beer bottle on an employee's face. (App. 165).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight.". *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

A PCR applicant 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 applicant would not have plead guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Dalton v. State*, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). Counsel is presumed to have rendered competent advice at the time their clients considered pleading guilty. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Additionally, the burden is on the applicant to convince the court that rejecting a plea or plea bargain would have been rational under the circumstances. *Id.*

At the PCR hearing, Petitioner testified that Counsel told him that he was going to serve two and a half (2 ½) years on the firearm charge. (App. 226; 228). Petitioner testified that no one explained to him that the weapon charge carried a mandatory five (5) year mandatory sentence that is day for day, which he alleged affected his projected release date. (App. 228:8-15; 227:8-228:15). Petitioner testified that if he had known about the mandatory five (5) year sentence, he would not have pleaded guilty and would have "continued" to trial. (App. 227; 229). Petitioner further testified that Counsel did not explain to him the possible penalties of the offenses. (App. 233-34).

Counsel testified that she has been practicing law since 1986, fifty percent (50%) of which has been in criminal practice. (App. 342-43). Counsel testified that Petitioner shot Victim, and the issue in the case was [whether Victim had] a gun: Petitioner did not put in his statement that Victim had a gun but ultimately revealed that fact to Counsel. (App. 244). Counsel testified that three (3) witnesses all gave statements that Petitioner shot Victim. (App. 244). Counsel testified that Petitioner's defense for trial was that Victim had a gun, and Petitioner was acting in self-defense. (App. 245-46).

Counsel testified that Petitioner's ex-girlfriend, Alexis Fludd, corroborated Petitioner's story that Victim had a weapon. (App. 246). Counsel testified that Fludd told Counsel on many occasions that Victim had a gun, and Counsel found Fludd to be credible. (App. 247). Counsel testified that Fludd "completely changed her testimony" at the Stand Your Ground hearing and testified that she saw Petitioner with a gun and did not see anybody else with a gun. (App. 247; 83). Counsel testified that Fludd was [the defense's] main witness, and Counsel had no need to think that Fludd would change her story but not having anyone to corroborate Petitioner's story was "very detrimental to his case." (App. 247:7-12). Counsel testified that Petitioner also believed Victim would not come to the hearing and believed the State would not be able to refute Petitioner's testimony, but Victim was present at the hearing. (App. 247).

Counsel testified that Petitioner lost the Stand Your Ground motion, and after the jury was selected for trial, Petitioner decided to plead guilty to the State's offer of a six (6) year cap. (App. 248-49). Counsel further testified that Petitioner was "very afraid of the system because his witnesses [were] turning against him at the last hour, that really was a shock to him." (App. 251:1-7). Counsel testified that in response to Fludd changing her testimony, Petitioner decided to take the plea offer instead of going to trial. (App. 248:16-249:5; 251:5-7).

Thomas Sims, Sr. ("Sims") assisted Counsel with Petitioner's Stand Your Ground hearing. Sims testified that Fludd was going to testify that she saw Victim with a gun but during the Stand Your ground Hearing, Fludd recanted and testified that she did not see Victim with a gun. (App. 253-54). Sims testified that Fludd changing her testimony "affected [Petitioner's] opinion." (App. 254:11). Sims testified that he and Counsel discussed with Petitioner the change in Fludd's testimony "in terms of whether or not he wanted to – still go to trial." (App. 254:11-13). Sims testified that, after the discussion, Petitioner decided to plead guilty. (App. 254).

I. Petitioner failed to prove there's a reasonable probability that he would have insisted on going to trial but for Counsel's advice on the sentence for possession of a weapon during the commission of a violent crime because the determinative factor in his decision to plead guilty was his ex-girlfriend, a key-witness for his defense, changing her testimony shortly before trial which undermined his self-defense claim.

Petitioner failed to prove prejudice from Counsel's alleged failure to advise him that possession of a weapon charge carried a mandatory five (5) year sentence because he failed to prove a reasonable probability that he would not have pleaded guilty and would have gone to trial but for Counsel's advice. To prove prejudice from counsel's erroneous advice, the defendant must demonstrate a reasonable probability that but for counsel's errors, he would not have pled guilty but would have insisted on going to trial. *Hill*, 474 U.S. at 59; *Rodriguez v. State*, 422 S.C. 431, 437, 907 S.E.2d 153, 156 (Ct. App. 2024) (citing *Taylor v. State*, 422 S.C. 222, 233, 810 S.E.2d 862, 867 (2018)). The *Hill v. Lockhart* inquiry focuses on the defendant's decision making to determine whether a defendant would have insisted on going to trial. *Lee v. United States*, 582 U.S. 357, 367, 137 S.Ct. 1958, 1966 (2017). "Courts should not upset a guilty plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, [the courts] should look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* at 368, 137 S.Ct. at 1966.

In *Lee*, the Supreme Court held that a defendant, who was facing deportation, demonstrated a reasonable probability that he would have rejected the plea and proceeded to trial but for counsel's erroneous advice about his immigration consequences. *Id.* The Court found that the "determinative issue" in the defendant's decision to plead guilty was avoiding deportation. *Id.* The Court based its finding on testimony from both the defendant and his plea counsel that deportation was the defendant's determinative factor in deciding whether to plead guilty, and the defendant

relied on counsel's erroneous assurance that he would not be deported if he pleaded guilty. *Id.* at 361.

Similarly, in *Taylor*, the South Carolina Supreme Court held that a defendant, who was facing deportation, demonstrated a reasonable probability that he would have rejected the plea offer and proceeded to trial but for counsel's failure to properly advise him on the risk of deportation. *Taylor v. State*, 422 S.C. 222, 810 S.E.2d 862 (2018). Focusing on the defendant's decision making, the Court found that the "determinative factor" in the defendant's decision to plead guilty was avoiding deportation, similar to the defendant in *Lee*. *Id.* at 233, 810 S.E.2d at 867 (citing *Lee*, 137 S.Ct. at 1966-67). The Court based its finding on the defendant's expressed statement in an affidavit that if he had known he would face deportation, he would not have pleaded guilty, and the defendant relied on counsel's erroneous advice in making the decision to plead guilty. *Id.* at 225-26, 810 S.E.2d 863-64.

Here, the contemporaneous evidence presented at the PCR hearing from Counsel's and Sims' testimonies that Petitioner decided to plead guilty after his ex-girlfriend, Fludd, changed her testimony supports a finding that this was the determinative factor in Petitioner's decision to plead guilty. Although Petitioner testified at the PCR hearing that he would not have accepted the plea offer and would have proceeded to trial if he had known about the mandatory five (5) year sentence, this is merely a *post hoc* rationalization, which this Court should not entertain. *Rodriguez*, 444 S.C. at 436, 907 S.E.2d at 155 (quoting *Lee*, 582 U.S. at 369 ("Courts 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. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.")). The contemporaneous evidence from Counsel's and Sims' testimonies, rather than Petitioner's, is sufficient to support the finding

that Petitioner would not have insisted on going to trial but for Counsel's advice about his sentence. *See Rodriguez v. State*, 444 S.C. 431, 436, 907 S.E.2d 153, 155 (Ct. App. 2024) (affirming the PCR court's finding that the determinative factor in an applicant's decision to plead guilty was a shortened sentence where the finding was based on plea counsel's testimony rather than the applicant's), *cert. denied.*

The sole issue in Petitioner's case was whether Petitioner could establish the elements of self-defense for shooting Victim. Petitioner's self-defense claim hinged on whether Victim was armed with a gun. Both Counsel and Petitioner anticipated that Fludd would testify that Victim had a gun, and Counsel prepared a self-defense strategy for trial based on both Fludd's statements to Counsel. However, when Fludd changed her testimony on the eve of trial, Petitioner was left without a witness to corroborate his self-defense claim. Counsel testified that Fludd changing her testimony was "very detrimental" to Petitioner's case. Upon this realization, Petitioner made the decision to plead guilty instead of proceeding to trial.

Additionally, where the determinative factor in Petitioner's decision to plead guilty was Fludd changing her testimony, Petitioner failed to prove that it would have been rational for him to proceed to trial where at least three (3) witnesses would have testified that Petitioner shot Victim, and Victim was unarmed. *Padilla*, 559 U.S. at 372 ("to obtain relief…a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"). Therefore, Petitioner failed to prove he was prejudiced by Counsel's alleged failure to advise him of the mandatory five (5) year sentence for the weapon charge because the determinative factor in Petitioner's decision to plead guilty was whether he could establish self-defense at trial, not the sentence he would receive. The PCR court correctly denied relief.

II. The PCR court correctly found that Petitioner pleaded guilty knowingly and intelligently with an awareness of the mandatory five (5) year sentence for the

weapon charge where Counsel credibly testified that she explained to Petitioner the charges, possible penalties for each charge, and his constitutional rights, and Petitioner failed to overcome the strong presumption that Counsel rendered competent advice.

The PCR court correctly found Petitioner pleaded guilty voluntarily, knowingly, and intelligently. When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To find a defendant entered a guilty plea knowingly and voluntarily, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874. This involves awareness of "the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers" and "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*, 337 S.C. at 599, 524 S.E.2d at 624 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). Statements made during a guilty plea should be considered conclusive unless the applicant presents valid reasons why he should be allowed to depart from the truthfulness of his statements. *Dalton*, 376 S.C. at 137-38, 654 S.E.2d at 874.

At the guilty plea, Counsel informed the plea court that she explained to Petitioner the charges against him, the possible punishment, and his constitutional rights. (App. 158). At the PCR hearing, Counsel testified that prior to pleading guilty, she explained to Petitioner the charges he was facing: ABHAN, possession of a weapon during the commission of a violent crime, and assault and battery – second degree (from a separate incident). (App. 249-50). Counsel also testified that she explained to Petitioner the possible penalties for all of the charges. (App. 250:6-8). Counsel testified that she explained to Petitioner his constitutional rights including his right to a jury trial, right to confront witnesses, and right to testify or not testify. (App. 250). Counsel

testified that she never told Petitioner that he would only serve two-and-a-half (2 ½) years. (App. 251-52). Counsel further testified that in her experience practicing law, she would not tell a defendant that they would serve a set amount of time. (App. 251).

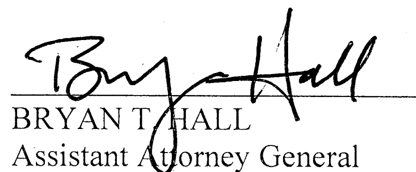
The PCR court found Counsel's testimony *credible* that she explained to Petitioner the charges he was facing, the penalties for the charges, and his constitutional rights. (App. 269 (emphasis original)). The PCR court also found *credible* Counsel's testimony that she did not tell Petitioner that he would only serve two-and-a-half (2½) years for the charges. (App. 269 (emphasis original)). Counsel has been practicing law since 1986, fifty percent (50%) of which has been in criminal practice. (App. 342-43). There is a *strong presumption* that Counsel, an experienced criminal defense attorney, explained to Petitioner prior to pleading guilty that possession of a weapon during the commission of a violent crime carried a mandatory sentence of five (5) years. *Padilla*, 559 U.S. at 372 ("We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty." (citing *Strickland*, 466 U.S. at 690)); *Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814 ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (quoting *Strickland*, 466 U.S. at 690)).

The PCR court found Petitioner failed to overcome the presumption that Counsel rendered competent advice. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 ("The defendant is required to overcome the presumption that counsel was effective in order to receive relief."). The PCR court's factual finding that Counsel correctly and competently advised him about the penalty for the possession of a weapon during the commission of a violent crime charge is supported by Counsel's *credible* testimony. Therefore, this Court should defer to the PCR court's factual findings and uphold the PCR court's ruling. The PCR court correctly denied relief.

CONCLUSION

Based on the foregoing argument, the PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests this court to affirm the PCR court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,



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