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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Darlington County Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2021-001155

Cephas Cowick, # 383684,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR REHEARING

On July 2, 2025, this Court affirmed the PCR Court’s dismissal of the post-conviction relief application in the above-captioned case. Because the Court's holding misapprehends the genuine issues in this case and overlooks critical facts and points of law pivotal to determination of the issues that were raised for review, Petitioner must respectfully petition for rehearing pursuant to Rules 221(a) and 240, SCACR.

I.

This Court agreed with the PCR Court's conclusion that Petitioner's waiver of PCR was effective and within the scope of the plea agreement in light of Plea Counsel's letters to the Solicitor, the plea affidavit, and the colloquy at the plea hearing. This holding overlooks critical facts established by the record and points of law.

First, an exception to the PCR waiver for ineffective assistance of counsel claims was made on the record at the guilty plea and sentencing hearing. One of Petitioner's plea attorneys, William S. McGuire, Esq., had informed Judge Griffith during the plea hearing: "Mr. Cowick is waiving all of the claims to him unrelated to ineffective assistance" on the basis that "case law indicates that it would be unethical for us to counsel him to waive claims against us. So, any known claims with regard to anything in his case that he knows about is [sic] waiving, but not specifically ineffective. We're not able to encourage him to do that." (App. p. 126, line 22—p. 127, line 3).¹ Another of his plea attorneys, Nathan R. Scales, Esq., added to this explanation that this was the "maximum of what we can allow him to waive." (App. p. 127, lines 4-7). Solicitor Redmond did not object to this limitation to the scope of the waiver and Judge Griffith stated he understood this limitation and ultimately accepted the plea agreement. (App. p. 127).

The exception made for ineffective assistance of counsel claims to the waiver was reiterated at the Motion to Dismiss hearing. Mr. McGuire testified that at the plea hearing: "I think I put on the record that we could not - - we could not advise any client to waive any claims against us. That would be unethical, because we would have an interest in that and that's in the *Sanders* case." (App. p. 46, lines 5-13). Mr. McGuire also testified that this nuance of case law was discussed with Solicitor Redmond during negotiations. (App. p. 44, lines 11-16; p. 43, lines 18-19).

Thus, the exception to the waiver made for ineffective assistance of counsel claims became a binding enforceable term of the agreement because it was put on the record at the plea hearing and the judge ultimately accepted the plea agreement. *See State v. Thrift*, 312 S.C. 282, 295-96,

¹ Petitioner's testimony at the Motion to Dismiss hearing aligns with Mr. McGuire's explanation about the exceptions to the waiver. Petitioner testified that when meeting with his lawyers about the plea agreement, he was told he would still be able to seek post-conviction relief on ineffective assistance of counsel claims and claims based on "new knowledge." (App. p. 52, lines 8-20).

440 S.E.2d 341, 348-49 (1994) (holding plea agreements are to be enforced according to only those terms that are fully set forth on the record). Moreover, Solicitor Redmond did not make any objection at the plea hearing to the limitation of the scope put on the record by Mr. McGuire. *See State v. Thomason*, 355 S.C. 278, 286, 584 S.E.2d 143, 147 (Ct. App. 2003) (“When the State’s Attorney has given his word in the form of a plea bargain and that bargain is accepted by the trial court, it behooves the State’s Attorney to make every reasonable effort to correct any deviation from the bargain when the deviation is called to his attention.”) (quoting *Alston v. State*, 38 Md.App. 611, 379 A.2d 754, 757 (Md. 1978)). *See also United States v. Wood*, 378 F.3d 342, 350 (4th Cir. 2004) (holding that the Government acquiesced to modification of the plea agreement by failing to object to the plea judge’s explanation of the scope of the waiver which differed from that originally agreed upon and by making statements that appeared to buttress the judge’s interpretation of the agreement).

Moreover, the Court's holding that Petitioner's PCR allegations were known to him at the time is not supported by the record as there is nothing in the entire record to dictate which if any claims or issues Petitioner had been made aware of at the time of his plea. Therefore, according to the rule set out in *Thrift* that all plea agreement terms must be fully set forth in the record to be enforceable, the plea agreement waiver is not enforceable to exclude the claims raised in Petitioner's PCR application. Regardless, according to the record, the plea agreement's waiver does not apply to claims of ineffective assistance of counsel, irrespective of whether any such claims were known to him at the time. The specific language used by Mr. McGuire (App. p. 126, line 22—p. 127, line 3) demonstrates that ineffective assistance of counsel claims were entirely excluded from the waiver, regardless of whether they known or unknown by Petitioner because his plea attorneys had felt that a waiver that encompassed ineffective assistance of counsel claims would be unethical pursuant to *Sanders*. Moreover, the record demonstrates that the exception to

the waiver for "unknown claims" is not specifically limited to just new information or new evidence that arose after the guilty plea. At the Motion to Dismiss hearing, when asked whether this term pertained to claims based on newly discovered evidence, Mr. McGuire testified that: "It wouldn't necessarily have to be newly discovered." (App. p. 44, lines 6-10).

Further, although this Court held that the PCR Court properly considered the letters and plea affidavit, neither are determinative to the waiver's enforcement or scope for several significant reasons. The letters and plea affidavit, both of which make no mention of the exception to the waiver for ineffective assistance of counsel claims or for unknown claims, clearly conflict with the waiver exception that was put on record. *See infra*. Moreover, the letters are not controlling to the issue of whether there was such an exception to the waiver because there is no indication in the record that the letters were entered into the guilty plea hearing record² or given to the judge, nor were the letters read into the record during the guilty plea hearing.³ Thus, the letters are not binding or enforceable as comprises the plea agreement in lieu of a formal written agreement. *See Thrift*, 312 S.C. at 295-96, 440 S.E.2d at 348-49; *Reed v. Becka*, 333 S.C. 676, 686-88, 511 S.E.2d 396, 402 (Ct. App. 1999).

Further, this Court's finding that "plea counsel admitted [the letters] essentially constituted a written plea agreement", defies what was established in the record. At the Motion to Dismiss hearing, Mr. McGuire contradicted his earlier testimony on direct-examination and clarified on cross-examination that the letters do not contain all terms of the plea agreement. (App. p. 43, lines 2-8). Likewise, this Court's finding that "the plea affidavit form further laid out the terms" of the agreement also lacks support. After acknowledging at the Motion to Dismiss Hearing that the

² The letters were first entered into the record at the Motion to Dismiss Hearing.

³ The letters are not signed by Petitioner and there no indication that Petitioner had read the letters or was aware of their content at the time of guilty plea hearing.

letters do not contain the entire agreement, Mr. McGuire then pointed to the plea affidavit that Petitioner had signed before the plea hearing as containing the whole plea agreement. (App. p. 43, lines 8-10). However, he subsequently clarified that the plea affidavit is a boilerplate-like form that fails to mention the waiver at all, again explaining that there were claims that could not be waived pursuant to *Sanders*. (App. p. 43, lines 11-24; p. 45, line 12—p. 46, line 13).

Therefore, despite the contents of the letters and plea affidavit, which make no mention of the exception to the waiver, the terms put on the record at the plea hearing became the binding and enforceable terms of the plea agreement. At the plea hearing, Mr. McGuire put on the record that Petitioner was waiving claims unrelated to ineffective assistance of counsel claims. (App. p. 126, line 22—p. 127, line 3). Solicitor Redmond made no objection, and the plea judge accepted the plea agreement. Therefore, pursuant to *Thrift*, the waiver's exception for ineffective assistance of counsel claims became enforceable and binding. Accordingly, Petitioner urges this Court to vacate its decision and reverse the PCR Court's dismissal of his PCR application.

II.

This Court held that Plea Counsel was not ineffective and that the PCR court's finding that Petitioner knowingly and voluntarily waived his right to PCR was proper and is supported by the record. This holding overlooks critical facts established by the record and points of law. First, the decision in this case does not incorporate a full analysis of the factors set forth in *Spoone v. State*, 379 S.C. 138, 141-42, 665 S.E.2d 605, 606-07 (2008) and its successor, *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015). *See Spoone*, 379 S.C. at 143-44, 665 S.E.2d at 608 (holding that whether an appellate/PCR waiver is knowing and voluntary is dependent upon the particular facts and circumstances surrounding the case, including: the background, experience and conduct of the accused, the text of the plea agreement, the transcript of the plea hearing).

Rather, this Court largely focuses on the transcript of the plea hearing factor to the exclusion of the other *Spoone* factors and considerations. In relying on this factor, this Court held that the plea transcript "shows the plea court meticulously discussed Petitioner's decision to plead guilty, ensured his understanding of the plea, and reiterated the implications and limitations of his waiver of appeal and collateral relief." However, this factor weighs in favor of Petitioner. Far from the colloquy in *Spoone*, "where the trial court specifically asked petitioner about the waiver both in the language of the plea agreement, as well as in plain language", the plea colloquy here was not straightforward. Throughout the colloquy with Petitioner, the plea judge used inconsistent descriptors for the types of remedies/rights covered by waiver and phrased the waiver's effect in terms that communicated to Petitioner that he would be free to decide in the future to pursue any certain claim or remedy notwithstanding the waiver. (App. p. 125, line 22—p. 126, line 4; p. 126, lines 6-13; p. 129, lines 6-7). Overall, the explanations provided to Petitioner on the plea agreement were not phrased in clear, consistent or plain language and continued to evolve throughout the colloquy with input by his plea attorneys and Solicitor Redmond, and also rephrasing by the plea judge. (App. p. 120, line 16—p. 121, line 1; p. 124, line 17—p. 126, line 19). Indeed, Petitioner testified at the Motion to Dismiss Hearing that the plea colloquy was confusing to him at times. (App. p. 52, lines 8-9). Just before the plea was accepted as knowing and voluntary, Mr. McGuire specifically informed the plea judge that Petitioner's attorneys had not advised him on the waiver as barring ineffective assistance claims due to their position that case law prevented them from counseling any client to enter a plea agreement that would waive claims against themselves. (App. p. 126, line 22—p. 127, line 7). The plea judge replied that he understood and asked Petitioner whether he was satisfied with his attorney's advice, but the judge did not further elaborate on the matter

apart for a passing statement that did not assist in Petitioner's understanding of the plea agreement terms. (App. p. 127, lines 17-25).

The Court's analysis also overlooks that Judge Griffith did not inquire into Petitioner's understanding about Mr. McGuire's explanation about the waiver. Petitioner was also never asked⁴ whether he understood the waiver as barring ineffective assistance of counsel claims or barring such claims that were "known" to him at the time. The plea judge instead inquired into whether Petitioner was satisfied with his attorneys' advice. (App. p. 127, line 8—p. 128, line 4). Petitioner's answers in the affirmative to this line of questioning do not operate as a waiver of ineffective assistance of counsel claims and are not determinative as to whether his waiver or entry into the plea agreement/guilty plea was knowing or voluntary. *See Kolle v. State*, 386 S.C. 578, 592, 690 S.E.2d 73, 80, n. 5 (2010), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839, n. 2 (2018). Likewise, to the extent that the unknown vs. known claims distinction was discussed during the colloquy, (App. p. 118, lines 4-14), the explanation of possible issues he might have known was too vague and insufficient to categorize the allegations in his PCR application as those known to Petitioner at the time of the plea and thus barred by the waiver. Apart any possible defense or mitigation stemming from Petitioner's previous head injuries, it is not as though there is anything in the entire record establishing which, if any, specific defenses or challenges, or issues were actually discussed with Petitioner.

The testimony at the Motion to Dismiss Hearing provides further support under this factor. Petitioner testified that from his discussions with his attorneys and with the plea judge, he believed he could still pursue ineffective assistance of counsel claims and claims he had not

⁴ Nor did Petitioner state or otherwise communicate that he understood the waiver as having such effect.

been previously made aware of. (App. p. 51, lines 13-22; p. 52, lines 9-17). Mr. McGuire likewise testified that he felt it was unethical under *Sanders* to counsel Petitioner to enter an agreement that would waive claims against himself and the other plea attorneys. (App. p. 46, lines 5-13). Although Mr. McGuire and Petitioner testified that they had discussed the plea agreement terms and the PCR waiver prior to the plea, there is no testimony that a waiver of ineffective assistance of counsel claims, specifically, was ever discussed.

Further, as set forth in Petitioner's Brief and Petition for Writ of Certiorari, the remaining relevant factors weigh in favor of Petitioner. The text of the plea agreement factor weighs in favor of Petitioner because according to the terms fully set forth on the record pursuant to *Thrift*, an exception to the waiver for ineffective assistance of counsel claims became an enforceable, binding term of the plea agreement. However, the terms put on record at the guilty plea hearing, particularly the exception for known vs. unknown claims, were not as clearly set forth as the "straightforward" text of the plea agreement in *Spoone*.

This Court did not discuss the "background, experience, and conduct of the accused" *Spoone* factor, but this factor does not definitively cut in favor of the conclusion that the waiver was knowing and voluntary. Petitioner had been treated for mental illness just before the commencement of his case in 2015, which appears to have prompted a competency evaluation. (App. p. 122, lines 2-14, p. 182). The plea judge had also paused his exchange with Petitioner to further inquire with his other plea attorney, Ms. Kuchar, regarding his mental state due to the nature of his responses during the colloquy. (App. p. 122, lines 15-25). Though he was not medicated at the time of the plea, Petitioner had been previously treated and medicated for mental illness, including follow-up treatment at the jail. (App. p. 122, line 24—p. 123, line 18; p. 182). Petitioner had also sustained traumatic brain injuries earlier in his life, which prompted SCCID to begin an investigation and consult with neurology experts. (App. p 46, line 14—p.

47, line 13). Petitioner also testified that being in solitary confinement for most of the nearly four (4) years before his plea impacted his ability to address his case during meetings with his attorneys. (App. p. 50, line 24—p. 51, line 12). Therefore, under the *Spoone* factors, the record fails to establish a knowing and voluntary waiver of ineffective assistance of counsel claims.

Moreover, this Court's holding inherently anticipates that the parties had indeed intended and negotiated for a waiver of all ineffective assistance of counsel claims, which is in direct conflict with Mr. McGuire's statements at the plea hearing and Motion to Dismiss Hearing. Therefore, if in actuality the parties had intended and negotiated for such a waiver, and plea counsel misadvised Petitioner that he could still nonetheless pursue ineffective assistance of counsel claims, then Petitioner received constitutionally defective advice regarding the waiver.

This Court's analysis of the prejudice prong also overlooks critical facts and points of law. First, the decision cites overwhelming evidence of Petitioner's guilt to hold that the prejudice prong had not been met. This reasoning overlooks the fact that the only evidence of Petitioner's guilt in the record consists of merely a summation of the facts of the offense as the factual basis for the guilty plea. Next, the prejudice analysis places undue emphasis on the fact that by pleading guilty, Petitioner avoided the death penalty had he gone to trial and ultimately been convicted. The pivotal issues in this case exist irrespective of the possibility that Petitioner may have been convicted had he gone to trial and may have subsequently received a death sentence. The alternative possibility of ultimately receiving a death sentence down the line should not have played such a paramount role in the analysis as many PCR cases involving defective plea agreements or advice have been granted despite the fact that the respective defendant faced more severe sentencing penalties absent the plea agreement they entered into. Petitioner was made to

understand the plea agreement as still allowing him to raise ineffective assistance of counsel claims in a PCR application, and he entered into the plea agreement believing that. Through the dismissal of his PCR application, Petitioner was deprived of this benefit of the bargain.

III.

Therefore, in light of the foregoing, the PCR Court erred in concluding the scope of the waiver included ineffective assistance of counsel claims, and pursuant to the factors set forth in *Spoone* and its federal predecessors, Petitioner's waiver of ineffective of assistance of counsel claims was not knowingly or voluntarily made. Petitioner otherwise received constitutionally defective advisement when entering into the plea agreement and agreeing to the waiver pursuant to *Sanders*.

Petitioner thus respectfully urges this Court to vacate its opinion, reverse the PCR Court's Order of Dismissal, and remand for a full evidentiary PCR hearing on the merits with instructions that the plea agreement waiver does not bar the type of allegations currently raised in his PCR application, as well as prospectively in a petition for writ of habeas corpus.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Petition for Rehearing was served upon Counsel for Respondent, Assistant Attorney General Joshua Edwards, by email to his AIS email address: JEdwards@scag.gov.

This day, the 16th day of July, 2025.

Respectfully Submitted,

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