STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000478

Joshua Johnson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Whether Petitioner's mental retardation and multiple psychiatric disorders could have impacted his ability to understand and participate in his own defense, to understand and appreciate the charges and his waiver of rights, and to be able to freely, voluntarily, knowingly, and intelligently enter a guilty plea? This includes whether Petitioner's counsel was ineffective for not fully investigating and evaluating Petitioner's mental retardation and psychiatric disorders and the failure to fully disclose them to the plea court. This further includes the question of whether the plea judge's inquiry during the colloquy was sufficient and whether further inquiry was warranted before accepting the plea.

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the June 2010 term of General Sessions for second-degree criminal sexual conduct with a minor (2010-GS-39-1074). Steven L. Alexander, Esquire represented Petitioner.

On June 30, 2011, Petitioner pled guilty. The Honorable Letitia H. Verdin sentenced Petitioner to ten years imprisonment, provided that upon the service of seven years imprisonment, the balance was suspended to five years probation. (App.p.241). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on January 31, 2012 (2012-CP-39-0140). (App.pp.9-15). A hearing was convened at the Pickens County Courthouse on December 17, 2012. (App.pp.22-85). Petitioner was present and represented by Jeffrey Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order filed January 31, 2013. (App.pp.1-8).

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, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving his guilty plea was not knowing and voluntary.

Petitioner argues "mental retardation and multiple psychiatric disorders could have impacted his ability to understand and participate in his own defense, to understand and appreciate the charges and his waiver of rights, and to be able to freely, voluntarily, knowingly, and intelligently enter a guilty plea." (Pet. Cert., p.i). Petitioner argues "the record fails to show that [he] fully understood the myriad of things necessary to validly enter a plea." (Pet. Cert., p.9). This argument is without merit.

At the guilty plea hearing, Petitioner stated he was satisfied with plea counsel's representation. (App.pp.228-29). Petitioner stated he was not under the influence of any drugs or alcohol. (App.p.229). Petitioner stated he had not been forced to plead guilty that day and that no one made any promises in exchange for his plea. (App.pp.229-30). Petitioner agreed to waive various constitutional rights and plead guilty. (App.pp.231-32). Petitioner stated he understood he was pleading guilty to a charge with a maximum sentence of twenty years. (App.pp.232-33). Petitioner did not object to the assistant solicitor's recitation of the facts: that he had sexual intercourse with a thirteen year old. (App.p.237). During the mitigation portion of the plea, plea counsel stated Petitioner was "diagnosed when he was younger of a mild version of autism, Your Honor, uh, Aspergers syndrom[e]" and that Petitioner admitted to having "taken several Oxycodones that night when this happened." (App.p.240).

At the PCR hearing, plea counsel testified he reviewed the discovery materials with Petitioner and Petitioner's version of the events. (App.p.44). Plea counsel testified they reviewed the elements of the charges and the differences between a trial and a guilty plea. (App.p.45).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving his guilty plea was not knowing and voluntary. (App.pp.6-7; p.8).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). Before a defendant can enter a guilty plea, he "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). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "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." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). 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 post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citation omitted).

The PCR judge did not err in finding Petitioner failed to meet his burden of

proving his guilty plea was involuntary. The plea judge advised Petitioner of the maximum sentence he was facing and the variety of rights he was waiving in entering a guilty plea. The plea judge conducted a thorough colloquy and there is no indication in the record that Petitioner did not understand either her questions or the purpose of the guilty plea hearing. There is no evidence in the guilty plea transcript to support Petitioner's assertion that his guilty plea was not knowing, intelligent, and voluntary; therefore, the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). Further, plea counsel testified he and Petitioner discussed the facts and evidence in the case and the elements of the charge. (App.pp.44-45). Based upon the full record, it is clear Petitioner pled guilty with a full understanding of the charge and the consequences of the plea.

As Petitioner failed to meet his burden of proving his guilty plea was involuntary, 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.").

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective.

Petitioner argues plea counsel "was ineffective for not fully investigating and evaluating Petitioner's mental retardation and psychiatric disorders and [failing] to fully

disclose them to the plea court." (Pet. Cert., p.i). This argument is without merit.

At the PCR hearing, plea counsel testified Petitioner's mother was generally present at their meetings. (App.pp.32-33; p.34; pp.45-46). Plea counsel testified that, a meeting four months before the plea hearing,[1] Petitioner's mother stated Petitioner had been diagnosed with Asperger's syndrome when he was younger. (App.pp.34-35). Plea counsel testified that, while he asked Petitioner for "medical records, medical documentation," this information was never provided to him at any point during his representation. (App.p.34; pp.37-38; p.47). Plea counsel testified he did not recall Petitioner's mother telling him Petitioner had prior treatment by South Carolina Department of Mental Health – and that he would generally have notes to reflect such information. (App.pp.38-39; pp.42-43). Plea counsel testified he "went based on [his] ability to discuss with [Petitioner] the case. [He] saw no red flag so to speak that raised any concerns as to competency." (App.p.39). Plea counsel testified he never had any problems communicating with Petitioner. (App.p.41; p.46). Plea counsel testified he never saw anything in his meetings with Petitioner that would cause him to perform an independent investigation on this issue. (App.p.42). Plea counsel testified Petitioner had been employed and no one ever told him either that he was drawing a disability check or had a prior diagnosis of mental retardation. (App.p.46).

Penny Crenshaw, Petitioner's mother, stated she had meetings with plea counsel. (App.p.49). Crenshaw stated she told plea counsel – at the start of his representation –

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[1] Plea counsel testified he was appointed in July 2009 but the topic of Asperger's syndrome was first mentioned at this meeting on February 8, 2011. (App.p.38).

"about [Petitioner] having disability, Asperger's and things like that. I did tell him he went to Mental Health when he was younger."[2] (App.p.50; p.59). Crenshaw stated she told plea counsel that Petitioner "was on SSI disability." (App.p.50). Crenshaw stated Petitioner was "on multiple types of medications off and on." (App.p.53). Crenshaw admitted on cross-examination that Petitioner finished tenth grade and had at least two jobs over the course of his life. (App.p.58).

Johnny Crenshaw, Petitioner's stepfather, stated Petitioner went to appointments at the Department of Mental Health. (App.p.61). Crenshaw admitted on cross-examination that he did not tell plea counsel Petitioner was collecting SSI disability checks and did not provide plea counsel with any of Petitioner's prior mental health records. (App.p.65).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving "plea counsel should have investigated his prior mental health history in order to present this information as mitigating evidence." The PCR judge also found Petitioner failed "to present any credible evidence or testimony to establish he suffered any prejudice." (App.pp.5-6).

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

[2] Crenshaw stated Petitioner first visited the "Mental Health Center" when he was in second grade. (App.p.51).

(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) (citation omitted).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective. Petitioner failed to prove plea counsel's representation was deficient. Plea counsel testified he was first told of Petitioner's previous Asperger's diagnosis approximately four months before the plea hearing but that he was never provided with Petitioner's medical records or documentation. (App.pp.34-35; pp.37-38; p.47). Plea counsel testified, however, that he had no problems communicating with Petitioner and did not see any "red flag" that would make him question Petitioner's competency or ability to plead guilty. (App.p.39; pp.41-42; p.46). The PCR judge found plea counsel's testimony was credible. (App.p.5). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Plea counsel's testimony that there were no signs or

indications of mental health issues is supported by the record. Neither Petitioner's mother nor stepfather provided plea counsel with any documentation of Petitioner's prior mental health treatment. Further, Petitioner had an employment history, a driver's license, and had been in the eleventh grade. (App.p.40; p.58; p.60; pp.230-31). Based upon his interactions with Petitioner, the lack of documentation of any prior mental health treatment, and the facts known to him at the time, Petitioner cannot prove plea counsel was deficient in failing to investigate Petitioner's history. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 (holding "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct); see also Lee v. State, 396 S.C. 341, 721 S.E.2d 442 (Ct. App. 2011) (finding the PCR applicant could not demonstrate plea counsel's performance was deficient becuase she had no indication of the applicant's mental status).

Petitioner also failed to meet his burden of proving he was prejudiced because plea counsel did not investigate his mental health history. Petitioner failed to present a competency evaluation or report from the South Carolina Department of Disabilities and Special Needs to support his contention that a further investigation of his mental health history would have changed the outcome of this case. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant

not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Further, Petitioner failed to present an expert witness to either testify to Petitioner's state or interpret his prior mental health records. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the PCR applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"). The PCR judge was correct in finding he could not speculate without any of this documentation or testimony having been presented. (App.p.6). "In a PCR action, the petitioner bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). Petitioner failed to present any compelling or credible evidence or testimony that – had plea counsel investigated Petitioner's mental health history – the results of this case would have been different.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance. As Petitioner failed to meet his burden of proof, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The issue of whether the plea judge made a sufficient inquiry during the plea colloquy is not preserved for appellate review.

Petitioner alleges the plea judge failed to make a sufficient inquiry into

Petitioner's mental health history during the plea colloquy. (Pet. Cert., p.4). This argument is not preserved for review by this Court because it was not ruled upon by the PCR judge in the order of dismissal. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Regardless, this issue is without merit because it is not a proper issue for post-conviction relief. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). As the issue of whether the plea colloquy was proper in this case could have been raised on direct appeal, this issue cannot be raised for the first time in post-conviction relief.

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 issues discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

November 12, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000478

Joshua Johnson,..... Petitioner,

v.

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

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jeffrey Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served. This 12th day of November, 2013.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

November 12, 2013

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

Re: Joshua Johnson v. State of South Carolina
Appellate Case No: 2013-000478
Lower Court Case No: 2012-CP-39-0140

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Jeffrey Falkner Wilkes, Esquire
Trisha Allen, Victim Services Counselor