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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2025-000351

LONNIE MILLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

TRAVIS CRUISE MITCHELL
S.C. Bar No. 105682
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF ISSUES PRESENTED

I. The PCR court erred in finding plea counsel provided effective representation where she failed to have her client evaluated for sleep apnea which would have been a mitigating factor at his plea.

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

I. The PCR court properly found plea counsel was not ineffective for failing to investigate Petitioner's sleep apnea diagnosis as it would offer no mitigation value for the offense of hit and run.

STATEMENT OF THE CASE

The Aiken County Grand Jury indicted Petitioner for two counts of reckless homicide with death resulting (2017-GS-02-1234, -01235), two counts of failure to stop a motor vehicle at the scene causing death (2017-GS-02-737, -0739), and failure to stop a motor vehicle at the scene of an accident with personal injury (2017-GS-02-0741), all stemming from a March 13, 2017, motor vehicle accident caused by Petitioner that resulted in the death of two victims and the injury of a third victim. The case was prosecuted by Second Circuit Solicitor Strom Thurmond. Petitioner was represented by Maureen O. Floyd, Esquire.

On February 16, 2018, Petitioner appeared before the Honorable Doyet A. Early, III, and pleaded guilty as indicted. Judge Early accepted Petitioner's guilty pleas and sentenced him to concurrent sentences of twenty-five years imprisonment for each count of failure to stop a motor vehicle at the scene causing death, ten years imprisonment for each count of reckless homicide with death resulting, and one year imprisonment for failure to stop a motor vehicle at the scene of an accident with personal injury (2017-GS-02-0741). Petitioner did not purse a direct appeal.

On December 13, 2018, Petitioner filed a post-conviction relief application. On July 16, 2024, a hearing into the matter was convened before the Honorable Brian M. Gibbons at the Aiken County Courthouse. Petitioner was present and represented by Nancy C. Fennell, Esquire. Assistant Attorney General T. Cruise Mitchell represented the State. At the evidentiary hearing, testimony was taken from Petitioner, Sheila Miller (Applicant's mother), and Maureen O. Floyd, Esquire ("Counsel").

On January 23, 2025, Judge Gibbons issued an order of dismissal denying and dismissing Petitioner's allegations with prejudice. This appeal follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.; Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The PCR court properly found plea counsel was not ineffective for failing to investigate Petitioner's sleep apnea diagnosis as it would offer no mitigation value for the offense of hit and run.

Summary of Petitioner's Crimes and Subsequent Entry of Guilty Plea

On March 13, 2017, Department of Transportation workers were assigned to check a clogged drain on the side of Highway 421. At 8:32 am, Applicant was traveling 59 miles per hour in a 45 mile an hour zone, heading north on Highway 421, when he left the roadway and struck three of the workers. Immediately following the collision, Applicant veered back into the road and left the scene. Two of the workers were pronounced dead at the scene and another was hospitalized with severe injuries. A witness notified law enforcement that he saw a brown Pontiac with heavy damage pull into a nearby trailer park. Law enforcement observed a vehicle matching the description with a blanket placed over it to conceal the damage. Applicant turned himself in several hours after the incident. (Gp. Tr. pp. 13–18).

During the ensuing guilty plea hearing, Petitioner confirmed he was pleading guilty to two counts of hit and run resulting in death, one count of hit and run resulting in severe bodily injury, and two counts of reckless homicide and personally acknowledged the potential sentences for each offense. (App. pp. 6–8). Petitioner further confirmed he was waiving his right to a jury trial, was promised nothing in exchange for his plea, and was completely satisfied with Counsel. (App. pp. 6–10). Following the colloquy, the plea court found Petitioner's guilty plea to be freely, voluntarily, and intelligently made. (App. p. 12). Thereafter, the Solicitor recited the facts of the crime. (App. pp. 13–18). The Solicitor then recounted Petitioner's abysmal driving record as follows:

The Court: No, sir, you go this whole driving record?

Mr. Thurmond: Yes, sir.

The Court: Le me have it, please. Not in my hand, do it on the record.

Mr. Thurmond: Yes, sir, I'll include everything. 2004, fleeing from police, hit and run, reckless driving, failure to maintain lane, violation of a limited permit. 2005 - -

The Court: Hold on a second. Fleeing, hit and run, what else?

Mr. Thurmond: Reckless driving, failure to maintain lane and violation of a limited permit; 2005, driving while license revoked for serious violations under the age of 21; and a second count for that in 2005; and fleeing from police again in 2005; 2006, speeding in a construction zone with workers present; 2006, running a red light, driving without a license, no insurance; 2007 - -

The Court: One second, please. Go back to '06. Speeding in a construction zone?

Mr. Thurmond: With workers present is what the Georgia ticket says. And a separate incident in 2006, running a red light, driving without a license, no insurance; 2007, fleeing from police, violation of an instructional permit. And since you wanted all of them, I'll give you all of them –

The Court: Hold on a second. 2007, fleeing again from - -

Mr. Thurmond: Yes, sir.

The Court: - - police.

Mr. Thurmond: And violation of instructional permit; 2009, illegal window tint; 2009 driving with a shattered windshield; 2011 loud music; 2012, driving without a license, no brake lights; 2012, driving with an expired tag, failure to maintain lane; 2013, improper passing resulting in an accident; 2014 passing in a no-passing lane.

The Court: Hold on a second. '13, improper passing with accident.

Mr. Thurmond: Yes, sir. 2014, passing in a no passing lane; 2015, driving with a broken headlight; 2016 driving without headlights.

(App. pp. 18–20).

Following the Solicitor's recitation of the facts, Counsel spoke on Petitioner's behalf, indicating that Petitioner has expressed tremendous remorse for the incident and that Petitioner fell asleep at

the wheel due to sleep apnea. (App. pp. 25–26). Upon inquiry by the court, Counsel stated that there are no medical records of Petitioner's sleep apnea. (App. p. 26). Counsel further indicated she did not believe Petitioner to be under the influence at the time of the collision. (App. p. 31). Petitioner then addressed the court, expressed remorse, apologized to the victims, and accepted responsibility for the crimes. (App. pp. 36–38). Members of Petitioner's family, including his sister and mother, addressed the court in which they both asserted that Petitioner loves his kids and family, was truly remorseful for his actions, and requested mercy in sentencing. (App. pp. 39–43). Multiple victims then addressed the court explaining how Petitioner's crimes have impacted their lives. (App. pp. 44–67). After listening to these remarks, the plea judge sentenced Petitioner to concurrent sentences of twenty-five years imprisonment for each count of failure to stop a motor vehicle at the scene causing death, ten years imprisonment for each count of reckless homicide with death resulting, and one year imprisonment for failure to stop a motor vehicle at the scene of an accident with personal injury. (App. pp. 67–70).

Discussion

Petitioner alleges the PCR court erred in finding plea counsel was not ineffective for failing to have Petitioner evaluated for sleep apnea which could have been a mitigating factor at his plea. The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*

v. Washington, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel's deficient performance must have prejudiced Petitioner such that "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. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

In this case, the plea judge imposed a sentence falling squarely within the permissible sentencing range—and forty-six years less than the maximum term of imprisonment allowable—for Petitioner's offenses. Despite this sentence, Petitioner contends that Counsel was deficient in

her mitigation investigation. Specifically, Petitioner alleges Counsel should have had Petitioner evaluated for a sleep apnea diagnosis.

The PCR court did not err in finding Counsel was not deficient for failing to have Petitioner evaluated for a sleep apnea diagnosis. First, any further investigation into Applicant's sleep apnea would not have been relevant to his defense in a hit and run case, and may, in fact, have been harmful to his defense. According to S.C. Code § 56-5-1210(A):

> The driver of a vehicle involved in an accident resulting in injury to or the death of a person immediately shall stop the vehicle at the scene of the accident or as close to it as possible. He then shall return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 56-5-1230. However, he may temporarily leave the scene to report the accident to the proper authorities. The stop must be made without obstructing traffic more than is necessary.

The relevant inquires for a hit and run are "whether defendant was aware he was involved in incident involving vehicle and whether he complied with statute which required him to remain at scene of incident and statute which required him to provide certain personal information." *State v. Westmoreland*, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017). At the PCR hearing, Counsel testified intentionality of the collision was an irrelevant factor for hit and run and a sleep apnea diagnosis would provide no defense to hit and run. (App. p. 151; p. 159). Counsel cannot be deemed deficient for failing to investigate a sleep apnea diagnosis which would have offered no defense to the crime nor any value in mitigation. *See Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation"). Thus, the PCR court did not err by finding Counsel was not deficient.

As to the prejudice prong, Petitioner has failed to prove a reasonable probability the plea court would have imposed a lesser sentence had Counsel presented medical records of Petitioner's purported sleep apnea diagnosis. Petitioner admitted he had no medical diagnosis of sleep apnea

at the time of the plea. (App. p. 134). Although Petitioner was diagnosed years following the incident, it is speculative as to whether he had that diagnosis at the time of the collision. Additionally, Counsel testified Petitioner never requested an evaluation and never informed her of his prior passing out episodes to which he later testified at the PCR hearing. (App. p. 149). While Counsel was aware Petitioner believed he had sleep apnea prior to the plea, she testified she was not aware of any instances of him falling asleep while driving, on the toilet, or in the bathtub, and neither Petitioner nor his mother relayed such information to her. (App. p. 156). As the PCR court found, Counsel reasonably explained that had Petitioner been evaluated and disclosed these prior episodes to a doctor "it would have upped his credibility because he knew he shouldn't be driving." (App. p. 157). Therefore, Petitioner has failed to show that a medical evaluation for sleep apnea would have provided any meaningful mitigation.

Furthermore, the plea judge twice articulated his reasons for the sentence at Petitioner's guilty plea. Once right before Petitioner addressed the plea court during mitigation:

> But, before he does, you understand if by accepting responsibility, he's still, because of his reckless driving, caused the horrible death of those two men and injuries to a third person: the families have suffered *and he didn't stay at the scene. He consciously covered the car up, consciously left the scene, consciously left the car where it was.*
>
> So, I've got to up all that on the scales when I weight out what is an appropriate sentence: obviously tempered by some mercy because he accepted responsibility, but that's why we have laws that govern the operation of vehicles on the highway
> ...
>
> And gracious me, *he has just snubbed his nose to our laws since - - for 14 years.*

(App. p. 36) (emphasis added).

And again right before handing down the sentence:

> This is a tragic situation where two fine men with families and grandchildren and friends lives were snuffed out in the blink of an eye and the third worker left injured and devastated and will never get over it.

> So trying to decide what punishment is appropriate in a situation like this is always a difficult task. In this case, the law allows me to give up to 71 years. That is, I don't think, appropriate under these circumstances. You asked for mercy. I will temper this sentence with mercy. You ask for forgiveness. Obviously, I can't impose a sentence that forgives you. I think these family members, as one wife expressed, if they haven't already forgiven, they will probably in this future forgive you to some degree.
>
> But my job mandates that I balance out the violation of the law and what it caused and it's a very difficult job, Son, it's very difficult.
>
> I have to look at similar cases in the past. Quite frankly, I've never had one this severe with these type of situations. I just had on about maybe 2 months ago, 3 months ago, time flies, where a young man swerved across the center line and no reason and ran over a person and killed them and continued on. That was one death. That man received a sentence of 15 years. We have two deaths here. We have one man injured. And then notwithstanding what some people have said, I have to look and take into consideration that you have been a habitual violator of the driving laws all the way back to 2004.
>
> In addition, you were on probation for violating the substance laws. So balancing all of that out, the sentence that I'm going to give you is what you'll think is way too much, the families will think it's way too little.
>
> I've been doing this a long time. 14 years on the bench, 30 years practicing law, and trying to decide and judge what an appropriate sentence is, is always a - - not always, in these kinds of cases, it's always a difficult situation.
>
> I believe you're truly sorry. I believe you're remorseful. But society demands that I send a message that if you're going to drive in a reckless manner and fail to stop and render aid, fail to stop so appropriate tests can be done.
>
> (App. pp. 68–70).

Clearly, the plea court's stated reasons for the sentence were twofold: 1) the tragic nature of the offenses, and 2) Petitioner's abysmal driving record. (App. pp. 18–21). The presentation of medical records reflecting a sleep apnea diagnosis would not have mitigated either factor. Thus, Petitioner has failed to demonstrate a reasonable probability the outcome of the proceeding would have been different.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari, as the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issue raised.

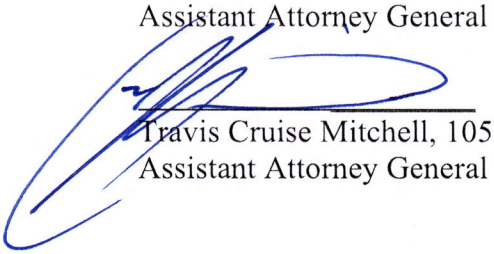
Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

TRAVIS CRUISE MITCHELL, 105682
Assistant Attorney General



Travis Cruise Mitchell, 105682
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
803-734-3737
CruiseMitchell@scag.gov

ATTORNEYS FOR THE RESPONDENT

This 23rd day of March, 2026.