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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari from Spartanburg County

J. Mark Hayes, II, Circuit Court Judge
R. Lawton McIntosh, Post-Conviction Relief Judge

Appellate Case No. 2025-000935

MARK S. WINGO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issue Statements

- I. "Did the post-conviction relief court err denying relief where defense counsel was ineffective for failing to conduct an independent investigation prior to advising petitioner to plead guilty rendering petitioner's guilty plea invalid?" (Pet. 1).
- II. "Did the post-conviction relief court err denying relief where defense counsel was ineffective for failing to address petitioner's mental health difficulties throughout her representation rendering petitioner's guilty plea invalid?" (Pet. 1).
- III. "Did the post-conviction relief court err denying relief where defense counsel misadvised petitioner regarding sentencing and a potential state's witness thus inducing an invalid guilty plea?" (Pet. 1).

STATEMENT OF THE CASE

In August 2018, a Spartanburg County grand jury indicted Petitioner for trafficking methamphetamine, 200 to 400 grams. (App. 298-99). On May 6, 2019, Petitioner proceeded to a guilty plea hearing before the Honorable J. Mark Hayes, II. (App. 1).

Guilty Plea Hearing

Petitioner pled guilty in a hearing with multiple other defendants, none of whom are related to Petitioner's charge. (App. 1-7). During the individual portion of his hearing, the State informed the plea court of the crime for which Petitioner was indicted. (App. 13). The State also informed the court that Petitioner was pleading to the lesser offense of trafficking methamphetamine, 28 to 100 grams, with a negotiated sentence of 15 years' imprisonment. (App. 13). Petitioner affirmatively indicated his intent to enter a guilty plea as announced by the State. (App. 13). Petitioner stated that he had been in prison pending this hearing for 517 days. (App. 14). The State's recitation of facts was as follows:

This occurred on September 28, 2017. Weeks prior to that, during the month of September, a [confidential informant] had been contacted by [Petitioner] about setting up a deal to sell methamphetamine. There were several conversations that were recorded between the CI and [Petitioner] all leading up to the day of September 28, 2017.

On that date, the CI contacted Investigator Swad and stated that [Petitioner] had made contact, and wanted the CI to go and pick up a quantity of methamphetamine from a location in Spartanburg County, and take it to a location in Inman.

Your Honor, this—the CI was supposed to pick up 13 ounces of methamphetamine from a female known as Amy Fowler. She was at . . . Myra Street, Roebuck, which was [Petitioner's] ex-mother-in-law's address. The CI went to the address, met with Amy Fowler, picked up the package that did contain 357.94 grams of methamphetamine.

Your Honor, during this time, the CI was in constant contact with [Petitioner] . . . getting instructions. After he picked up the

methamphetamine from Amy Fowler, he was then instructed by [Petitioner] to meet with Amy Shuler. She was at her address, and she was to give him the address and tell him where to go next.

On the way there, [Petitioner] called and told him that Amy—that Renee Shuler was going to have scales and baggies, and that they were going to break up the methamphetamine. Then he was to take, take it to another female in Pacolet. The CI met with Renee Shuler who did have scales and baggies in her purse. She was on the phone with [Petitioner] as the vehicle was pulled over, Your Honor. At that time, both the CI and Renee Shuler were—got out of the vehicle. The methamphetamine was found in a pocketbook that Ms. Shuler had.

Ms. Shuler stated that [Petitioner] had instructed her to meet with the CI, that she was to take the methamphetamine, divide it up, and then distribute it for him.

Your Honor, the whole time [Petitioner] was doing this, he was [incarcerated in the South Carolina Department of Corrections]

(App. 15-16). After the State's recitation of the facts, the plea court asked Petitioner if he believed that the State's recitation was substantially correct. (App. 16). Petitioner responded, "Somewhat. No." (App. 16). The plea court asked Petitioner if he wanted to speak with his attorney, after which Petitioner agreed that the State's recitation was substantially correct. (App. 16).

Petitioner indicated that he understood this was a negotiated plea and requested the court to accept it. (App. 16-17). He confirmed he had discussed the violent and serious nature of this offense with his attorney and still wanted to enter the plea. (App. 17). Petitioner confirmed he was guilty of trafficking methamphetamine, 29 to 100 grams. (App. 17). The State confirmed discovery had been shared with Petitioner's counsel. (App. 17-18). The State informed the plea court of Petitioner's criminal record, including the charges for which he was incarcerated at that time. (App. 18).

Plea counsel stated that she believed it was in Petitioner's best interest to plea. (App. 18-19). She stated she reviewed the discovery and believed if this case went to trial,

Petitioner would be convicted of the indicted offense that included a minimum sentence of ten years more than the negotiated sentence he would receive through his plea deal. (App. 19). Petitioner agreed with his counsel's statement. (App. 19).

Plea counsel informed the plea court that Petitioner's max out date for his existing sentence was a little over a year from the time of the plea hearing. (App. 19). She asked that the plea court consider starting his new sentence that day and running it concurrent with his then-existing sentence. (App. 19). Petitioner immediately stated, "I'm gonna withdraw my plea, Your Honor." (App. 19). Plea counsel told him he was making a mistake and Petitioner responded that this sentencing request was not what plea counsel told him previously. (App. 20). The plea court instructed Petitioner to talk to his counsel, after which Petitioner indicated that he wanted to continue. (App. 20). The plea court then found a substantial basis existed for the plea and sentenced Petitioner to 15 years' imprisonment per the negotiated agreement. (App. 20).

Later the same day as the plea hearing, plea counsel filed a motion for reconsideration of sentence. (App. 22). Three days later, plea counsel filed a motion to withdraw guilty plea. (App. 23).

Post-Plea Motions Hearing

On October 2, 2019, the plea court held a motions hearing for Petitioner's two post-plea motions. (App. 24). At the outset, Petitioner withdrew his motion for reconsideration of his sentence and proceeded only on his motion to withdraw his guilty plea. (App. 26-27). Plea counsel argued that Petitioner was on medication for his mental health to help him concentrate and cope with his surroundings. (App. 28). She asserted that Petitioner did not get his medication while in the county jail pending his plea hearing. (App. 28). Plea counsel indicated that Petitioner had spoken to his psychiatrist, who wrote a letter indicating that "it was important to continue his

medication as prescribed wherever he may be located." (App. 28). Plea counsel provided the State and to the plea court with a copy of this letter, which is included in the Appendix. (App. 28, 204-06).

Plea counsel stated that she conferred with the State prior to the plea hearing concerning potential State's witnesses, including one of Petitioner's family members. (App. 29). Plea counsel argued that the State informed her that the family member would testify against Petitioner as a material witness if the case went to trial. (App. 29). After Petitioner plead guilty, he told his counsel that his family member would not testify against him. (App. 29). Plea counsel stated that the family member was not available at the time of the motions hearing and requested a continuance until he was available. (App. 29-30).

The State asserted that it met with the family member several days before the plea hearing. (App. 30). The family member listened to some of the recorded phone calls between Petitioner and the CI. (App. 30). The State argued that the family member was able to identify Petitioner's voice on the recordings and that the family member indicated he would testify for the State. (App. 30). The plea court took the matter under advisement. (App. 30).

In its subsequently filed order, the plea court denied both motions. (App. 32-33). The plea court found Petitioner failed to present a sufficient factual basis to support his claim that the "lack of proper medical attention" prevented him from understanding what was taking place when he entered his plea because the record did not indicate that Petitioner's mental health issues interfered with his plea. (App. 32-33). The plea court also found Petitioner failed to present a sufficient factual basis to support his claim that his brother-in-law, who was an officer with the Spartanburg County Sheriff's Department, was not going to testify against him contrary to what had been presented to him prior to his plea because "it is unclear how [t]his testimony would have helped or

hurt" Petitioner. (App. 32-33).

Post-Conviction Relief Proceedings

On October 25, 2019, Petitioner filed his PCR application, which was subsequently amended. (App. 34-40, 49-51). In his amended PCR application, Petitioner alleged *inter alia*:

1. Counsel provided ineffective assistance of counsel that rendered [Petitioner's] guilty plea involuntary, due to but not limited to the following:
 - a. Counsel failed to properly review the evidence with [Petitioner] and conduct an independent investigation prior to the entry of the guilty plea.
 - b. Counsel failed to prepare for trial and properly advise [Petitioner] regarding possible defenses.
 - c. Counsel misadvised [Petitioner] prior to the entry of the plea agreement regarding the evidence against him and credit for time served, which induced his guilty plea. Additionally, counsel failed to ensure that he had a full and complete understanding at the time of the guilty plea.
 - d. Counsel failed to properly address [Petitioner's] mental health, specifically but not limited to his medications, prior to and during his guilty plea.
2. Counsel provided ineffective assistance of counsel in preparation for and during the post-plea motion hearing, to include failure to utilize a mental health expert, failure to address [Petitioner's] understanding regarding time credit, failure to ensure availability of a witness, and failure to properly advise [Petitioner] before the withdraw of the motion to reconsider.

(App. 49-50).

On September 3, 2024, Petitioner proceeded to an evidentiary hearing before the Honorable R. Lawton McIntosh. (App. 52). At the evidentiary hearing, Donna Maddox, an expert in forensic psychiatry, testified that she evaluated Petitioner before the hearing and that she had reviewed the transcripts from the plea and post-plea motions hearings. (App. 64-65). Maddox identified the letter plea counsel provided to the plea court during the post-plea motions hearing as a letter from

Dr. Megan Howard, who was a psychiatrist with a SCDC contract. (App. 66). Maddox stated that the letter concerned one of Petitioner's follow-up visits about six weeks before the plea hearing. (App. 66-67). Maddox stated that the letter noted that Petitioner reported not receiving all of his medications when he was at the Spartanburg County jail and that the letter indicated this was not good for Petitioner. (App. 67). Maddox testified that the letter indicated that if Petitioner abruptly ceased taking his medications, his mood could worsen, he could be unable to focus, and it could take weeks for Petitioner to stabilize after resuming his medications. (App. 67). She stated the letter included a list of Petitioner's medications, which included medications for seasonal allergies, blood pressure, ADHD, and two anti-depressants. (App. 67). Maddox testified she had reviewed Petitioner's medical records from SCDC, which indicated that a supply of his medications was sent with him from SCDC to the Spartanburg County jail, but because Spartanburg County does not treat ADD, Petitioner's ADHD medications were withheld before, during, and after his guilty plea while he was at the county jail. (App. 72-74). Maddox testified that the guilty plea transcript was the best representation of what occurred during the guilty plea hearing. (App. 84-85).

Brian Setree, a private investigator, testified that he reviewed the defense file and met with Petitioner. (App. 88). Setree expressed concerns about Petitioner's disposition to commit the crime of distribution because he was not aware of any prior distribution charges. (App. 94-95). On cross-examination, Setree confirmed he was unaware that Petitioner had a prior conviction for possession with intent to distribute. (App. 103). Setree expressed concern about a lack of control over the recorded phone calls, the chain of custody for the drugs, and the motivation of the CI. (App. 92-101). Setree met with Petitioner's brother-in-law and developed an understanding that Petitioner's brother-in-law did not intend to testify at trial and had not been contacted by plea counsel. (App. 99-100).

Petitioner testified that he received the distribution of methamphetamine charge on September 27, 2017, while he was serving a sentence on other charges. (App. 109). He stated he did not meet with plea counsel until approximately a year after he received the charge. (App. 110). When Petitioner first met with plea counsel, he stated they did not discuss much, but they did discuss the 15 year plea offer. (App. 110). He testified he told plea counsel that he did not want to take that plea offer and preferred a jury trial. (App. 110). Petitioner stated plea counsel provided him with discovery but did not go over it with him. (App. 110). Petitioner claimed he told plea counsel that he was not receiving his medications while at the Spartanburg County jail. (App. 111-12). He testified he told his psychiatrist about the medication withholding and received a letter about it. (App. 112). Petitioner claimed he gave this letter to plea counsel the first time they met and that plea counsel said she would give it to the "medical facility." (App. 113).

Petitioner testified he was not aware of plea counsel conducting an independent investigation. (App. 114). He stated plea counsel did not discuss any defenses with him. (App. 115). Petitioner claimed he brought up concerns about the CI with plea counsel because he believed the CI was a lifelong drug addict. (App. 116). Petitioner also claimed that he did not seek out the CI; rather, he asserted the CI sought him out, persistently asked about methamphetamines, and wore him down. (App. 116).

Petitioner asserted that he wanted a jury trial from the beginning and did not want to plead. (App. 120). However, Petitioner testified that a few days before his plea hearing, plea counsel told him that his brother-in-law would identify Petitioner as one of the voices in the recorded phone calls. (App. 120). Petitioner stated that his brother-in-law was a captain with the sheriff's department and that he believed a jury would believe his brother-in-law over him. (App. 121). Petitioner claimed plea counsel discussed credit for time served pending the plea hearing and his

understanding was that he would get that credit. (App. 121). Petitioner testified that based on plea counsel's advice concerning his brother-in-law's testimony and the credit for time served, he decided to plead guilty. (App. 122).

Petitioner stated plea counsel did not ask whether he had taken his medications on the day of the plea hearing. (App. 123). Petitioner claimed he did not know what to do when the plea court asked if he had ever received any drug treatment because he was embarrassed. (App. 125). He stated that despite his indication at the plea hearing that he was satisfied with plea counsel's representation, he was not satisfied but felt like he could not do anything. (App. 126). Petitioner stated that he initially did not agree with the Solicitor's recitation of the facts because the CI pursued him and not the other way around. (App. 129). He also took issue with his lawyer asking for his sentence on this trafficking charge to start on the day of the plea hearing because, according to him, she had previously said he would get credit for time served. (App. 130).

Petitioner stated that if his counsel had told him that the plea court would not be inclined to give him credit for time served pending the plea hearing, he would have gone to trial. (App. 134). He did not know whether plea counsel sent anyone to talk to his brother-in-law or if his brother-in-law was under a subpoena to testify. (App. 136-37, 141).

Plea counsel testified that she met Petitioner for the first time before his preliminary hearing and met with him several times thereafter. (App. 152-53). She communicated the initial 15 year plea offer to Petitioner and stated it was initially for 15 years consecutive to the sentence he was then serving but changed to concurrent the week before Petitioner's plea. (App. 153). Plea counsel did not recall anything about Petitioner not receiving his medications until early 2019 when Petitioner told her he did not get his ADHD medications at the county jail and could not concentrate. (App. 153-54). She testified that Petitioner "seemed pretty normal." (App. 153-54).

Plea counsel stated that nothing in Petitioner's presentation indicated that there would be any problem with him going to court or communicating with her during court. (App. 154). She did not recall receiving Dr. Howard's letter, but confirmed she received discovery and gave a copy of the discovery to Petitioner. (App. 154-55).

Plea counsel stated that she reviewed the recorded phone calls in the solicitor's office before discussing them with Petitioner. (App. 155-56). According to plea counsel, Petitioner did not say anything about a trial until four days before his plea but was adamant from the outset that he wanted to negotiate. (App. 156). She conveyed several of Petitioner's counteroffers to the State. (App. 156).

Plea counsel testified that she did not conduct an independent investigation because her investigators do not do so unless red flags are raised when reviewing discovery. (App. 156). She commented on problems in Petitioner's case, including his burner phone that he had in prison and the CI also being charged. (App. 156-57). Plea counsel testified that she did not discuss defenses with Petitioner because she did not believe he had any. (App. 157).

Plea counsel stated that a few days before the plea hearing, she explained to Petitioner that he was not entitled to credit for time served. (App. 161-62). Plea counsel testified that she told Petitioner that they could ask for credit but that he was not entitled to it. (App. 162). She believed she could not ask in good faith for credit for time served while incarcerated on a different sentence. (App. 162). Plea counsel testified she discussed with Petitioner that his sentence would be concurrent to his preexisting sentences and that he would not get credit for time served. (App. 167).

Regarding the brother-in-law, plea counsel stated that the solicitor told her that the brother-in-law would identify Petitioner's voice on the recorded phone calls. (App. 162-63). Plea

counsel stated she had no reason to think the solicitor, as an officer of the court, would lie to her. (App. 163). She did not contact the brother-in-law. (App. 163).

PCR Order of Dismissal

On December 4, 2024, the PCR court filed its order of dismissal. (App. 209-232). Throughout the order, the PCR court found plea counsel's testimony credible. (App. 216-232).

As to Petitioner's claim of ineffective assistance of counsel for failure to conduct an independent investigation prior to the guilty plea, the PCR court determined Petitioner failed to meet his burden. (App. 217-220). The PCR court found plea counsel's preparation was reasonable under prevailing professional norms. (App. 218). The PCR court determined that plea counsel articulated a reasonable strategic decision to not conduct an independent investigation because plea counsel did not see any red flags in the State's discovery production, plea counsel had concerns about Petitioner having a burner phone in prison that he used to commit this trafficking, and the CI was Petitioner's best friend of 35 years. (App. 219). The PCR court determined Petitioner also failed to show prejudice from plea counsel's performance because he failed to show that the outcome of his plea hearing would have been different if plea counsel had conducted an independent investigation, i.e. that he would have gone to trial. (App. 219). The PCR court noted that Petitioner failed to show that any evidence in this case was mishandled or otherwise had chain of custody issues despite Setree's concerns. (App. 219). It also found credible plea counsel's testimony that she had no reason to doubt the solicitor's intent to call the brother-in-law to authenticate Petitioner's voice on the recordings. (App. 220). The PCR court noted that plea counsel also testified the State had other ways of authenticating Petitioner's voice besides the brother-in-law's testimony. (App. 220).

Regarding Petitioner's claim of ineffective assistance of counsel for failure to address his

mental health issues and medication, the PCR court determined Petitioner failed to meet his burden. (App. 221-22). Noting that it found plea counsel's testimony that she had no concerns about Petitioner competency, that Petitioner discussed the case with plea counsel, that Petitioner did not tell plea counsel he was not given his medication on the day of his plea or otherwise had mental health concerns, and that Petitioner seemed normal to plea counsel, the PCR court found Petitioner failed to show deficiency where counsel credibly testified that she had no indication or concerns about his mental health status. (App. 222-23). The PCR court determined Petitioner failed to show that plea counsel's performance prejudiced him because he failed to show that he was incompetent at the time of the plea hearing. (App. 223).

Regarding Petitioner's claim of ineffective assistance of counsel for misadvising Petitioner on his eligibility for time served credit, the PCR court determined that Petitioner failed to meet his burden. (App. 225-26). Based on its finding that plea counsel's testimony was credible concerning plea counsel telling Petitioner that he was not eligible for time served credit but she would ask the solicitor for it, the PCR court determined plea counsel's advice was both accurate and competent. (App. 226). The PCR court further found that Petitioner failed to show he was prejudiced by plea counsel's performance because he did not show a reasonable probability that he would have insisted on going to trial but for counsel's advice. (App. 227).

Post-PCR Matters

Petitioner filed a timely motion to reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (App. 233-49). The PCR court held a hearing on that motion, which it subsequently denied. (App. 250, 296-97).

This appeal followed.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the court. *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839 (2018). The burden is on the petitioner to prove the allegations in the PCR application. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Appellate courts will defer to a PCR court's findings of fact and will uphold them if evidence in the record supports the findings of fact. *Id.* Appellate courts review questions of law de novo with no deference to the conclusions of the PCR court. *Id.* Appellate courts will reverse the decision of the PCR court when such a decision is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found that plea counsel did not provide ineffective assistance of counsel to Petitioner because evidence in the record shows Petitioner failed to prove that plea counsel's performance was deficient and that any such deficient performance prejudiced him such that he would have gone to trial instead of pleading guilty but for counsel's performance.

A two-prong test for determining effective assistance of counsel has been set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669. In the context of a guilty plea, the second prong requires a defendant to show that but for counsel's deficient performance, the defendant would have insisted on going to trial rather than pleading guilty. *Dalton v. State*, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). The defendant is required to overcome the presumption that counsel was effective to receive relief. *See Cherry*, 300 S.C. at 117, 386 S.E.2d at 625.

I. The PCR court properly determined that Petitioner failed to show that plea counsel provided ineffective assistance of counsel by not conducting an independent investigation.

A. Deficiency

"A criminal defense attorney has the duty to conduct a *reasonable* investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 260 (2008) (emphasis added). "The scope of a reasonable investigation depends on the

number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). A criminal defense attorney's duty to investigate is limited to *reasonable* investigations or a *reasonable* decision that makes a particular investigation unnecessary. *Id.* at 331, 642 S.E.2d at 597; *see also Strickland*, 466 U.S. at 691. In applying the *Strickland* standard to a claim of failure to investigate, courts should assess such a decision by counsel for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014). "[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." *Strickland*, 466 U.S. at 690.

To prevail on a claim that counsel did not adequately investigate a case, a defendant must present evidence of what counsel could have discovered or what other defenses the defendant could have requested counsel to develop if counsel had more fully investigated. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). Therefore, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

As the PCR court found, plea counsel's preparation and investigation in this case were reasonable under prevailing professional norms. (App. 218-19). Plea counsel testified that she met with Petitioner multiple times and provided him with discovery. (App. 152-55). She stated she reviewed discovery and had no concerns about it. (App. 155-56). Plea counsel testified that she did have concerns about Petitioner having a burner phone in prison, which was used in

conjunction with the crime charged, but did not see any viable defenses available to Petitioner based on the discovery. (App. 156-57). Plea counsel stated she had no reason to doubt the solicitor's statement that Petitioner's brother-in-law would testify that Petitioner's voice was on the recorded phone calls. (App. 163). Further, plea counsel testified that she did not utilize an investigator in this case because the discovery produced by the State did not raise any red flags that would normally prompt her office to conduct further investigation. (App. 156). The PCR court determined that plea counsel's testimony was credible. (App. 218-19).

Petitioner failed to produce evidence of what, if anything, plea counsel could have uncovered had she investigated beyond reviewing the discovery provided by the State. To the extent Petitioner asserts that plea counsel would have been able to present an argument of entrapment with further investigation, this argument is without merit because plea counsel stated she reviewed the evidence and did not see any defenses Petitioner could raise. (App. 157). Petitioner merely asserted that an entrapment defense would have been viable without any evidence to support his entrapment theory outside of his own self-serving testimony.

To the extent Petitioner asserts that plea counsel could have discovered with further investigation that his brother-in-law would not testify against him at trial, this argument is also without merit because Petitioner failed to call his brother-in-law to testify at the PCR hearing. While Petitioner did provide testimony from his own private investigator, who allegedly talked to Petitioner's brother-in-law, the State did not have the opportunity to cross-examine the brother-in-law or otherwise confirm the private investigator's assertion that the brother-in-law would not have testified if called during a trial. Therefore, the only evidence Petitioner presented—testimony from a private investigator who investigated the matter years after Petitioner pled guilty—amounts to

nothing more than mere speculation as to what plea counsel would have uncovered if she had investigated beyond what the State produced in discovery.

B. Prejudice

A defendant must also present evidence demonstrating how additional investigation, and any discoverable matters or defenses, would have resulted in a different outcome. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

Here, Petitioner failed to prove he was prejudiced by plea counsel's allegedly deficient performance because he failed to show that the information uncovered by his private investigator would have resulted in a different outcome—that he would have gone to trial instead of pleading guilty.

The private investigator testified he had concerns about the CI's motivations. (App. 94 101). However, Petitioner testified that the CI was his best friend of 35 years, which supports a finding that the CI was reliable regardless of his motivations. (App. 219).

The private investigator testified he had concerns about the handling of the seized drugs and chain of custody. (App. 92-101). However, Petitioner failed to present evidence tending to show that the seized drugs were mishandled or otherwise had issues in the chain of custody. The private investigator testified he spoke to Petitioner's brother-in-law, who told the private investigator that he would not have testified at Petitioner's trial. However, plea counsel credibly testified that she had no concerns regarding the State's intent to call the brother-in-law to authenticate Petitioner's voice on the recorded calls. (App. 163). Plea counsel also confirmed that the State had other ways to authenticate Petitioner's voice on the recorded calls even if the State did not call Petitioner's brother-in-law. (App. 220).

Therefore, the information uncovered by Petitioner's private investigator does not suggest Petitioner would have proceeded to trial rather than enter his guilty plea even if plea counsel had further investigated and uncovered this information. Thus, Petitioner failed to meet his burden, and the PCR court properly denied his application as to this issue.

II. The PCR court properly determined that Petitioner failed to show that plea counsel provided ineffective assistance of counsel for failing to address his access to mental health medication, which had no effect on his ability to rationally understand or his ability to consult with his attorney.

A. Deficiency

Petitioner failed to show that plea counsel provided deficient performance for failing to address his mental health concerns before, during, and after his plea. The PCR court found plea counsel's testimony credible. (App. 222-23). *Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) ("While we defer to the PCR court's credibility findings as to witnesses who testified before the PCR court, we do not defer to the PCR court's credibility findings as to witnesses who did not testify before the PCR court."). Plea counsel testified that she had no concerns about Petitioner's competency and that Petitioner seemed normal and had no readily discernable problems. (App. 153-55). She stated that during her meetings with Petitioner, he told her exactly what happened and asked lots of questions. (App. 152-55). Plea counsel testified Petitioner mentioned taking medications during their meetings. (App. 153-55). She stated nothing stood out to her that would support a belief Petitioner could not go forward with his plea on the day of the plea hearing. (App. 153-55). *See generally Lee v. State*, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (Ct. App. 2011) ("Plea counsel could not be deficient if she had no indication of [Petitioner's] mental status."). Therefore, Petitioner failed to show that plea counsel was deficient for failing to address his restricted access to his mental health medications.

B. Prejudice

Regarding Petitioner's contention that plea counsel's performance prejudiced him because plea counsel did not call a mental health expert at his guilty plea or at his post-plea motions hearing, Petitioner failed to show a reasonable probability that the result of either proceeding would have been different if a mental health expert was called. Therefore, he cannot show prejudice as to that claim.

Regarding his general mental health concerns and medications, in a PCR action, to show prejudice for counsel's failure to fully investigate an applicant's mental capacity, the applicant must show a reasonable probability, by a preponderance of the evidence, that he was incompetent at the time of the guilty plea. *Lee*, 396 S.C. at 320, 721 S.E.2d at 445-46. The PCR court properly determined that Petitioner failed to show by a preponderance of the evidence that he was incompetent when he pled guilty. Therefore, he failed to show prejudice as to this claim.

III. The PCR court properly determined that Petitioner failed to show that plea counsel provided ineffective assistance of counsel for misadvising Petitioner regarding sentencing and regarding a potential State's witness because plea counsel did not misadvise Petitioner regarding sentencing and the content of the potential witness's testimony would have been available to the State through other sources.

A. Deficiency

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 PCR court that rejecting a plea or plea bargain would have been rational under the circumstances. *Id.*

The PCR court found plea counsel's testimony credible. (App. 226-27). *Thompson*, 423 S.C. at 247, 814 S.E.2d at 493 ("While we defer to the PCR court's credibility findings as to witnesses who testified before the PCR court, we do not defer to the PCR court's credibility findings as to witnesses who did not testify before the PCR court.").

Regarding advice regarding sentencing, plea counsel testified that she informed Petitioner prior to the plea hearing that he could ask for time served and that she informed him that she believed he was not entitled to time served under the statute. (App. 161-67). This advice was both accurate and competent. *See* S.C. Code Ann. § 24-13-40(c)(2) ("Provided, however, that credit for time served prior to trial and sentencing shall not be given . . . when the prisoner is serving a sentence for one offense and is awaiting a trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense"). Moreover, Petitioner merely hoping or wishing to receive credit for time served is insufficient to support a collateral attack on his guilty plea. *See Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (holding that a defendant who "hoped" and "expected" to get a reduced sentence did not render his guilty plea invalid).

Regarding plea counsel's advice concerning Petitioner's brother-in-law testifying if Petitioner proceeded to trial, plea counsel testified that she had no concerns about the truthfulness of the State's intent to call the brother-in-law to authenticate Petitioner's voice on the recorded phone calls. (App. 162-63). Further, even if the State did not call the brother-in-law, there were other ways for the State to authenticate Petitioner's voice. Therefore, plea counsel did not provide deficient performance in her advice concerning the State's intent to call the brother-in-law if Petitioner proceeded to trial.

B. Prejudice

Petitioner failed to show a reasonable probability that he would have insisted on going to trial but for plea counsel's advice. Plea counsel testified that Petitioner encouraged her to negotiate with the State, including passing counteroffers back to the State for Petitioner. (App. 155-56). Further, repeated conversations with plea counsel about plea offers and credit for time served

indicate that Petitioner had no interest in proceeding to trial before he pled guilty. Moreover, as the PCR court determined, Petitioner failed to show it would have been a rational decision for him to proceed to trial and reject the State's 15 year plea offer where overwhelming evidence of his guilt existed—recorded phone calls, a reliable CI, seized drugs, and the jailhouse burner cellphone—and where he would have faced *minimum* 25 year sentence. (App. 227).

Regarding his brother-in-law, Petitioner cannot show that plea counsel's performance prejudiced him to the extent that he would have gone to trial but for plea counsel's performance because the State had other ways to authenticate Petitioner's voice. Petitioner claimed that his brother-in-law's law enforcement background made him think his brother-in-law would be more credible to a jury, which is why he pled guilty. (App. 121). However, this claim holds no weight given that the State could have authenticated Petitioner's voice on the incriminating recorded phone calls without the brother-in-law's testimony. Therefore, Petitioner failed to show plea counsel's alleged deficiency resulted in any prejudice to him, and the PCR court properly denied this allegation.

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CONCLUSION

Based on the foregoing, the PCR court correctly determined that Petitioner failed to show that plea counsel provided constitutionally ineffective assistance. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

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