

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001517

Billy Joe Hannah,.....Petitioner,

v.

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

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel coerced a guilty plea by forcing Petitioner to agree with the State's recitation of the facts, with which Petitioner strongly disagreed, and where plea counsel coerced Petitioner into reaffirming his guilty plea two days after the plea hearing when the State sought to amend Petitioner's sentencing sheets in order to reflect that Petitioner had pled guilty to two violent offenses when Petitioner believed he was pleading to two non-violent offenses?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the September 2011 term of General Sessions for felony driving under the influence (DUI) resulting in death (2011-GS-23-5729) and leaving the scene of an accident resulting in death (2011-GS-23-5730). (App.pp.105-07). James H. Price, III, Esquire represented Petitioner.

On June 26, 2012, Petitioner pled guilty. The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of twenty-five years suspended upon the service of twelve years and three years probation for felony DUI resulting in death and twenty-five years suspended during probation for leaving the scene of an accident resulting in death. (App.p.28). Petitioner did not file an appeal.

Petitioner filed an application for post-conviction relief (PCR) on March 7, 2013 (2013-CP-23-1351). (App.pp.30-61). A hearing was held at the Greenville County Courthouse on April 23, 2014. (App.pp.68-96). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison Hill denied relief in an order filed June 5, 2014. (App.pp.97-103).

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he entered an involuntary guilty plea.

Petitioner argues his guilty plea was not knowing, voluntary, or intelligent because plea counsel coerced him into pleading guilty and later “into reaffirming his guilty plea when the State sought to amend [his] sentencing sheets to reflect that [he] was pleading guilty to two violent offenses.” (Cert. Pet., p.9). Certiorari is not warranted in this case because Petitioner’s argument is without merit.

A.

While represented by a different attorney, Petitioner entered guilty pleas to these charges on October 13, 2011. The Honorable Letitia H. Verdin levied concurrent sentences of ten years on each charge.

On October 14, 2011, counsel for Petitioner filed a Motion to Withdraw Guilty Plea, arguing the terms of the plea agreement had been violated because the assistant solicitor made a sentencing recommendation during the plea hearing (and the parties had

agreed there would be no recommendation in this case). (App.p.59). By order filed June 4, 2012, Judge Verdin vacated Petitioner's guilty pleas.¹ (App.pp.60-61).

B.

Petitioner pled guilty on June 26, 2012 before the Honorable Edward W. Miller. The plea judge read the body of the indictments to Petitioner, advised him of the sentence ranges for the charges, and Petitioner said he understood. (App.p.3). The plea judge advised these were no-parole, 85% offenses and Petitioner said he understood. (App.p.4). Petitioner stated he wanted to plead guilty and had not been coerced in making that decision. (App.p.4). The plea judge advised Petitioner of the trial rights he waived in entering a guilty plea and Petitioner stated he wished to waive those rights. (App.pp.4-5). Petitioner stated he was guilty and was satisfied with plea counsel's representation. (App.p.5). The assistant solicitor noted there was no recommendation but that "[t]he State is arguing for a sentence of 15 to 20 years." (App.p.5). The assistant solicitor then recited the facts of the case, as follows.

James M. Anderson found a vehicle that had run off the road and noticed a passenger was still strapped into his seat. (App.p.6). James M. Anderson called 911 to report the accident at approximately 4:00 p.m. (App.p.6). Emergency personnel arrived at the scene, confirmed the passenger was deceased, and looked for the missing driver. (App.p.6). Law enforcement located an open container of beer and a milk jug that

¹ At this point, Petitioner's original plea attorney had been relieved and the plea attorney complained of in this action had been substituted. (App.p.60).

“smelled strongly of some type of liquor.” (App.p.6). Law enforcement determined the vehicle was registered to Petitioner’s wife. At approximately 5:00 p.m., James R. Anderson arrived at the scene and told law enforcement that Petitioner walked to his home 60-90 minutes earlier (smelling of alcohol and with scrapes on his face) and asked for a ride home because he had been thrown from a horse. (App.p.7). At approximately 5:30 p.m., Petitioner returned to the scene of the accident with his wife, who stated Petitioner admitted to her that he had been in an accident with the victim, who was still alive when he left the scene.² (App.p.7). A dashcam video recorded that Petitioner was Mirandized before telling officers that he was the driver, the victim was alive when he left, and that he had run all the way home to get help. (App.p.9). The following day, Ryan Atkinson came forward to say: he gave Petitioner a ride the previous day (to what was later determined to be James R. Anderson’s home), Petitioner said he was in a car crash but did not mention anyone else was involved, and that Petitioner declined Atkinson’s offer to use his cell phone. (App.p.9). A blood sample taken more than three hours after the accident indicated Petitioner tested positive for marijuana and had a blood alcohol level was 0.11 percent (which was extrapolated to have been 0.15 percent at the time of the accident). (App.p.9).

When asked if these facts were true and correct, Petitioner said “[n]ot exactly.” Petitioner disputed the State’s account of what he told James R. Anderson and stated he

² Petitioner called 911 at 4:43 p.m. – at the urging of his wife – and told the operator the victim was still alive when he left and that he had walked 12 miles to get help. (App.p.8).

left the scene to get help. (App.pp.10-11). The plea judge stated he did not believe he could accept the plea. (App.p.11). The plea judge had a bench conference with counsel and then plea counsel had a discussion with Petitioner. (App.p.12). When they came back on the record, Petitioner still disputed several facts of the State's case and the plea judge said he could not accept the plea. (App.pp.12-13).

Later the same day, the parties reconvened before the plea judge. (App.p.13). Petitioner stated "I agree with what the solicitor's sayin' that I am guilty for leavin' the scene." (App.p.14). Petitioner stated he told his prior tales because he was "scared and confused and a little bit idled right now." (App.p.14). Petitioner admitted he misrepresented what happened and did not avail himself of multiple opportunities to use the phone. (App.p.14). The plea judge accepted the plea "as being freely, voluntarily and intelligently made with the advice of a very competent attorney whom he states he's well satisfied, there is a substantial fact – substantial factual basis for each of the pleas." (App.p.14). Plea counsel gave a thorough mitigation argument, which included the fact that Petitioner sustained injuries during the accident and that it was unlikely the victim could have been saved. (App.pp.20-27). Petitioner stated he accepted responsibility "for the mistake and the accident that did happen" and said he was "very, very deeply remorseful for what happened." (App.pp.27-28).

Two days after the plea hearing, the parties appeared again before the plea judge to amend the sentencing sheets. The plea judge remarked that he had already advised Petitioner these were non-parolable offenses and Petitioner acknowledged this. Plea

counsel stated they had discussed this but that he had not noticed the “violent” box was not checked on the sentencing sheets. Plea counsel stated he discussed this with Petitioner and that “it would affect him above and beyond the eighty-five.” When asked if this impacted his decision, Petitioner stated “I guess I’ll just have to take it and go with it.” The plea judge replied “[n]o sir” and said he would allow Petitioner to withdraw his guilty pleas but Petitioner said he did not want to do so. Petitioner consented to amending the sentencing sheets to read “violent.” (App.pp.47-50).

C.

At the PCR hearing, Petitioner argued he started to tell his version of events to the plea judge but was cut off. (App.pp.73-74). Petitioner stated plea counsel was called to the bench and then told him “if you don’t go along with this, it’s not going to be done any more today” and was “coercing [him] what to say.” (App.p.74). Petitioner argued plea counsel told him “[y]ou have to go back and tell that what the Solicitor was saying is true” but that what she was saying “was not exactly true.” (App.p.76). Petitioner argued he later admitted the State’s version of facts was correct because plea counsel told him to do so. (App.p.76). Petitioner stated plea counsel also coerced him into agreeing to the amendment of the sentencing sheets. (App.pp.78-79).

Plea counsel testified he was retained in March or April 2012 – before the order was issued vacating Petitioner’s first guilty pleas. (App.p.86; pp.91-92). Plea counsel testified he explained the effect of vacating those pleas and that Petitioner wanted to take this course of action. (App.p.86; pp.92-93). Plea counsel testified they discussed the

elements of the charges and sentencing ranges but did not review the violent versus non-violent distinction. (App.pp.87-88; p.93). Plea counsel testified, however, that Petitioner never mentioned he wanted to plead guilty to non-violent charges and it was “just a question of the amount of time that he had gotten, and him wanting to get a lighter sentence.” (App.p.88). Plea counsel testified he reviewed the plea colloquy questions with Petitioner several times. (App.p.87; p.89). Plea counsel testified he did not instruct Petitioner about how to answer the questions but did explain “what the Court would expect of him as far as admitting guilt.” (App.p.89). After the plea judge would not accept the plea, plea counsel testified he told Petitioner:

the Judge felt he was not accepting responsibility for the plea on leaving the scene with death. That the Judge felt that [Petitioner] was trying to state that he had sought help. And that the Judge was not going to accept the plea with the way that stood.

(App.pp.89-90). Plea counsel testified he did not coach Petitioner as to what he should tell the plea judge. (App.p.90). Plea counsel testified:

[Petitioner] wanted [sic] to know what he should state. And I just told him, the truth. And I told him what the elements were again, that he could not go in there and try to plead guilty but at the same time say that he was attempting to get help for his friend who was still in the car. And the decision to go forward was his. It was – he wanted to plead guilty in front of Judge Miller. That was the main thing that I got hired for.

[Petitioner] is a very strong-feeling Mason, Shriner. And he felt – for some reason, he felt that Judge Miller was a Mason. And that’s who he said he wanted to plead in front of? [sic]

(App.p.90). When Petitioner was later brought back to court, plea counsel testified he explained they were there to amend the sentencing sheets to read as “violent” and

confirmed Petitioner declined the plea judge's offer to withdraw his guilty pleas. (App.p.91; p.94).

D.

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving plea counsel coerced his guilty plea or somehow coached him as to how to answer the judge's questions." The PCR judge found credible plea counsel's testimony that he did not instruct Petitioner about how to answer the plea judge's questions. The PCR judge found Petitioner failed to "meet his burden of proving his guilty plea was involuntary because he was not allowed to present his version of the facts" because the plea judge was ware both of Petitioner's version of the facts and that he had admitted his guilt. The PCR judge found Petitioner failed to prove involuntariness or prejudice regarding the amendment of the sentencing sheets because Petitioner opted against withdrawing his guilty pleas. The PCR judge found there was no evidence in this plea transcript to support Petitioner's claim of coercion and concluded Petitioner "entered a knowing and voluntary guilty plea." (App.pp.100-02).

E.

To be knowing and voluntary, a guilty 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 court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. The defendant must be aware of the privilege against self- incrimination, the

right to a jury trial, and the right to confront one's accusers. Id. A defendant entering a guilty plea "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) (citation omitted). A 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) (citation omitted).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985)).

When determining issues relating to guilty pleas, the court will consider the entire record, including the guilty plea transcript and the evidence presented at the PCR hearing. See Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citation omitted).

F.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he is entitled to relief. Petitioner failed to demonstrate his guilty pleas were

involuntary because plea counsel coerced him both to plead guilty and then later assent to amendment of the sentencing sheets.

Petitioner cannot demonstrate plea counsel's representation "fell below an objective standard of reasonableness." Rolen, 384 S.C. at 413, 683 S.E.2d at 474. Petitioner argues that, during the guilty plea hearing, plea counsel coerced him and told him how to answer the plea judge's questions about the facts in this case. (App.p.74; p.76). Plea counsel, however, testified he told Petitioner to tell the plea judge "the truth" and explained the plea judge could not accept a guilty plea for leaving the scene of an accident involving death when Petitioner said he left the scene to get help for the victim. (App.pp.89-90). The PCR judge found plea counsel's testimony to be credible. (App.p.101). This Court must give great deference to this finding. 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."). The guilty plea transcript does not corroborate Petitioner's allegation of coercion. See Anderson, 342 S.C. at 57, 535 S.E.2d at 657. Rather, it clearly indicates the plea judge twice refused to accept the guilty pleas because Petitioner did not accept responsibility for the charge of leaving the scene of an accident involving death. After discussions with

plea counsel, Petitioner accepted the State's version of the facts.³ At no point does Petitioner state he is doing so under duress or as the result of coercion by plea counsel. Similarly, the record refutes Petitioner's assertion that plea counsel coerced him to consent to the amendment of the sentencing sheets. (App.pp.78-79). See id.; 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). Plea counsel testified he explained the purpose of the amendment to Petitioner and that Petitioner chose not to withdraw his pleas. (App.p.91; p.94). The transcript indicates (1) the plea judge advised Petitioner why the sentencing sheets must be amended and (2) Petitioner declined his offer to allow him to withdraw his guilty pleas. Petitioner did not state he feels pressured into consenting to the amendment of the sentencing sheets. Petitioner cannot prevail on his claim that plea counsel coerced his actions in this case because the record clearly refutes this argument. During both the guilty plea hearing and subsequent motion hearing, the decision whether to proceed was put squarely in Petitioner's hands and each time he opted to proceed.

Petitioner cannot demonstrate there is a reasonable probability that he would have gone to trial in this case. The plea judge twice refused to accept the guilty pleas, but Petitioner was insistent upon pleading guilty before this judge. Further, Petitioner later

³ To the extent Petitioner is arguing his pleas were involuntary because he was not allowed to give his version of events to the plea judge, Petitioner cannot demonstrate prejudice because the plea judge was well aware of how Petitioner viewed his conduct on that fateful day.

declined the opportunity to withdraw his guilty pleas. Thus Petitioner was given multiple opportunities to either go to trial or plead guilty before another judge and decided not to do so. Petitioner's own testimony at the PCR hearing defeats his argument that he would have gone to trial absent plea counsel's supposed ineffectiveness and the allegedly involuntary nature of his guilty pleas. During cross-examination, Petitioner stated he did not want to go to trial. (App.p.81). Petitioner also could not say he would not have pled guilty if he had known these were violent charges. (App.p.83). Accordingly, Petitioner failed to meet his burden of proving that, absent plea counsel's representation, he would not have pled guilty. See Rolen, 384 S.C. at 413, 683 S.E.2d at 474.

G.

Petitioner failed to demonstrate plea counsel's representation was deficient and led to involuntary guilty pleas to these charges. As Petitioner failed to meet his burden of proving he did not enter knowing, intelligent, and voluntary guilty pleas, 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.").

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 issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

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Billy Joe Hannah,..... 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:

John H. Strom, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 4th day of May, 2015.


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May 4, 2015

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MAY - 4 2015

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

S.C. Supreme Court

Re: Billy Joe Hannah v. State of South Carolina
Appellate Case No: 2014-001517
Lower Court Case No: 2013-CP-23-1351

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: John H. Strom, Esquire
Trisha Allen, Victim Services Counselor