STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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S.C. Supreme Court

The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2014-002676

Justin Rayl, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

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

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the post-conviction relief judge properly find Petitioner failed to meet his burden to show plea counsel's deficiency resulted in an involuntary guilty plea where plea counsel thoroughly prepared for trial, but advised Petitioner to enter a guilty plea when she learned of new evidence the day of trial?

STATEMENT OF THE CASE

In July 2007, the Horry County Grand Jury indicted petitioner for infliction of great bodily injury on a child. (App. pp. 216-217). Kia T. Wilson, Esquire, ("plea counsel") represented Petitioner. (App. p. 84) Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury on December 13, 2011. (App. p. 84). However, on March 14, 2011, Petitioner entered a plea of guilty as indicted. (App. p. 193, lines 6-12). Judge Cottingham sentenced Petitioner to ten years imprisonment. (App. p. 10). Petitioner filed a notice of appeal, but the South Carolina Court of Appeals dismissed the appeal on July 18, 2012. State v. Rayl, S.C. Ct. App. Order dated July 18, 2012.

Petitioner filed an application for post-conviction relief on December 13, 2012. (App. pp. 13-27). The Honorable John C. Hayes III ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Horry County Courthouse on August 27, 2012. (App. p. 28). Lacey M. Lee, Esquire, represented Petitioner. (App. p. 28). The post-conviction relief judge denied relief in an order dated November 16, 2014, and filed November 17, 2014. (App. pp. 3-9).

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding plea counsel's performance did not render Petitioner's plea involuntary.

Petitioner asserts plea counsel was ineffective for "failing to prepare for [Petitioner's] trial, did not provide the discovery to [Petitioner], failed to get all of the discovery from the State, and ultimately coerced [Petitioner] into a guilty plea with the assistance of her father[.]" (Pet. for Writ of Cert. p. 8). However, evidence in the record supports the post-conviction relief judge's finding plea counsel's trial preparation and advice were "well within the range of competence demanded of attorneys in criminal cases." (App. p. 7). Evidence in the record also supports the post-conviction relief judge's finding Petitioner's plea was "freely, voluntarily, and understandingly made." (App. p. 8). Accordingly, Respondent submits the post-conviction relief judge properly denied relief in this case.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). In post-conviction relief cases, an applicant asserting his guilty plea was involuntary must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel's advice was deficient and (2) there is a reasonable probability that, but for counsel's deficient advice, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart,

474 U.S. 52 (1985); Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56 (quoting McMann v. Richardson, 397 U.S. 759 (1970)). However, the Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

A. Plea counsel's performance was reasonable under the circumstances

Petitioner argues plea counsel was deficient in failing to procure medical reports, failing to interview a doctor, and failing to share discovery with Petitioner. (Pet. for Writ of Cert. p. 9). This argument is not supported by the record. Plea counsel's continuance motion at the outset of trial was based on having received x-ray images the prior week. (App. p. 88, line 1-18). Her motion was not based on not having any other medical records; in fact, she acknowledged she had timely received the other records. (App. p. 90, lines 10-15). Also, the solicitor and plea counsel acknowledged at the guilty plea that plea counsel interviewed the expert witnesses prior to trial. (App. p. 136, lines 9-11; p. 202, lines 6-12). Plea counsel testified at the evidentiary hearing that she thoroughly reviewed the medical records with Petitioner prior to trial. (App. p. 70, lines 13-21). She

did not recall him ever asking for a copy of any records. (App. p. 70, lines 20-21). Thus, the record indicates plea counsel reviewed all medical records and shared them with Petitioner prior to trial.

Petitioner also argues plea counsel was deficient in failing to discover how many interviews Petitioner had with police and failing to review the original interview tapes. (Pet. for Writ of Cert. p. 9; p. 13). Again, this argument is not supported by the record. Plea counsel testified she reviewed with Petitioner all taped statements the State provided. (App. p. 47, lines 15-18; p. 50, lines 13-14; p. 51, line 25-p. 52, line). She was also aware Petitioner met with police a second time. (App. p. 49, line 19-25; p. 51, lines 16-19). However, the tapes she received did not contain an audible second interview. (App. p. 47, line 17; p. 52, lines 4-11). Plea counsel therefore requested a transcript of all interviews; in response, the State provided a transcript of a single interview. (App. p. 55, lines 24). Plea counsel objected to the State's contention they provided a second transcript. (App. p. 138, lines 11-17). She testified at the evidentiary hearing that she was prepared to preserve this objection had Petitioner proceeded to trial. (App. p. 72, lines 4-18). She also discussed with Petitioner the fact he was waiving any objections to the second transcript by pleading guilty. (App. p. 72, line 19-p. 73, line 7). More importantly, plea counsel adamantly maintained Petitioner never disclosed to her the substance of his second conversation with police, despite their extensive conversations about the subject. (App. p. 47, line 22-p. 48, line 5; p. 50, lines 3-16). Once provided with the transcript, plea counsel reviewed it with Petitioner during an overnight break in trial. (App. p. 73, lines 8-14). Thus, the record indicates plea counsel diligently pursued information about the potential contents of a second interview and shared this information with Petitioner as soon as it was provided to her.

Based on the above facts, the post-conviction relief judge properly determined plea counsel's performance was not deficient. Petitioner's arguments to the contrary are unpersuasive. Specifically, Petitioner's reliance on Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), is misplaced. In Kolle, this Court held that an attorney's failure to procure certain evidence caused him to lose a suppression motion, and the outcome of the suppression motion affected the applicant's decision to enter a guilty plea. Kolle, 386 S.C. at 590-91, 690 S.E.2d at 79-80. In a sharply divided opinion, this Court determined the record supported the lower court's determination the applicant's attorney's deficient performance prior to the suppression hearing was fundamental to the applicant's decision to enter a guilty plea. Id. at 593, 690 S.E.2d at 81 (Pleicones, J., concurring) (noting this Court's "scope of review is limited to whether there is any evidence of probative value in the record to support the PCR judge's findings").

Here, plea counsel's advice to enter a plea was not contingent upon the result of a suppression hearing. Instead, it was based on the last minute discovery of material that was not provided until trial began. Plea counsel was adamant she did not receive a copy of a second transcript from the State.[1] Although she knew a second interview was conducted, she did not "have any substantive information" about the contents of that interview. (App. p. 113, lines 20-21). The record reflects plea counsel listened to the taped interview, and requested a transcript of it from the State when she could not discern what was on the tapes. Petitioner failed to present any alternative action plea counsel could have undertaken to procure this second transcript. Because plea counsel did all that

[1] Respondent notes any challenge to the disclosure of this second transcript was waived when Petitioner entered his plea, and plea counsel advised Petitioner he could continue with trial or waive the issue. See Kolle, 386 S.C. at 591, 690 S.E.2d at 80 ("Moreover, if plea counsel truly believed the suppression issue was meritorious, he could have advised Kolle to proceed to trial and, if convicted, challenge the denial of the suppression motion on direct appeal.").

was within her power to determine the substance of the second interview, she was not deficient for failing to discover the transcript prior to trial. Unlike the applicant in Kolle, Petitioner presented no evidence, other than his self-serving statements, to show plea counsel was unprepared for trial. Instead, the record demonstrates plea counsel was fully prepared for trial based on the information that was provided to her in discovery.

More importantly, Petitioner's own lack of candor caused plea counsel to be surprised by the transcript of the second interview. Because the recording of the interview was inaudible, plea counsel had no way of knowing the contents of the second interview other than through Petitioner's own recollection. However, the record is clear Petitioner never informed plea counsel that he gave a confession in his second interview.[2] If plea counsel was unaware of the contents of the second transcript, it is because Petitioner withheld such information from her. Petitioner's obfuscation does not create a deficiency on plea counsel's part. See, e.g., Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) ("Because of Moody's dishonesty to his own counsel, however, counsel were limited in their possibilities for mitigation investigation."); U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of 'ineffectiveness' for which relief can be granted."); Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)).

[2] When asked at the evidentiary hearing if he ever told plea counsel about the details of his second conversation with police, Petitioner first deflected blame and then feigned amnesia. (App. p. 41, line 6-p. 42, line 1). Strangely, in spite of "vaguely remembering anything from [...] the craziest day [he] ever had in [his] life," (App. p. 41, lines 24-25), Petitioner was able to recall in vivid detail the errors in the transcription of his confession (App. p. 42, lines 2-11).

The record indicates plea counsel acted diligently in attempting to obtain all discovery materials. She reviewed these materials with Petitioner prior to trial. When provided with a second transcribed statement the day of trial, plea counsel reviewed the statement with Petitioner and advised him of his options. Thus, probative evidence supports the post-conviction relief judge's finding plea counsel was not deficient in her representation of and advice to Petitioner.

B. Petitioner's plea was entered freely and voluntarily

Petitioner also argues plea counsel threatened to abandon representing him, used her father to coerce him into a guilty plea, and instructed Petitioner how to answer the questions presented by Judge Cottingham. (Pet. for Writ of Cert. p. 11; p. 13). These arguments are not supported by the record. Plea counsel testified she did not threaten to abandon representing him if he chose to continue with a trial. (App. p. 75, line 19-p. 76, line 5). Plea counsel testified her father came to court to discuss the case with Judge Cottingham and attempt to get the judge to declare a mistrial. (App. p. 65, lines 3-22; p. 66, lines 13-17). She also maintained her father did not threaten Petitioner in any way. (App. p. 74, line 18-p. 75, line 18). Plea counsel further testified she did not tell Petitioner to lie to Judge Cottingham, she merely explained to Petitioner that the judge would not accept the plea if he thought Petitioner was hesitant to enter the plea. (App. p. 76, line 6-p. 77, line 1).

There is no evidence in the record to rebut the presumption that Applicant's guilty plea was knowingly and voluntarily entered. "To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d

391 (1991)). A plea is valid where it "represents a voluntary and intelligent choice among the alternative courses of action[.]" Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (quoting Hill, 474 U.S. at 56). Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual[.]" Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Here, Petitioner's answers at the guilty plea indicate he understood the options he was facing at the time. He testified he understood he could continue with his trial if he chose. (App. p. 195, lines 11-19). Petitioner also acknowledged he was fully aware of the issues that arose during the trial and was satisfied with plea counsel's service. (App. p. 196, lines 7-17). Petitioner also testified at the evidentiary hearing that he entered his plea to avoid going to trial and facing a maximum sentence. (App. p. 43, lines 17-20, p. 44, lines 10-11). Based on this testimony, the post-conviction relief judge properly found Petitioner's could not credibly establish his plea was not free and voluntary. (App. p. 8). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a post-conviction judge's credibility findings).

Nothing in the record, other than Petitioner's self-serving statements, establishes plea counsel threatened to abandon petitioner, used her father to coerce petitioner, or instructed Petitioner how to answer Judge Cottingham's questions. Accordingly,

probative evidence supports the post-conviction relief judge's finding Petitioner's plea was freely and voluntarily entered.

C. Petitioner's argument he was prejudiced by plea counsel's performance is not preserved for appellate review

Petitioner argues he was prejudiced by plea counsel's failure to obtain the second transcript, by her request for a continuance, and by her failure to listen to the original interview tapes and obtain a transcript of them. (Pet. for Writ of Cert. p. 10; p. 11; p. 15). These arguments are not preserved for appellate review. The post-conviction relief judge specifically found he "need not analyze the second prong of the applicable standard, the 'but for' prong, as [plea] counsel was not ineffective[3] and committed no errors in her representation of Applicant nor in her advice as to a plea being in his best interest." Because the post-conviction relief judge did not rule on whether Petitioner was prejudiced by any of plea counsel's actions, these issues are not preserved for appellate review. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (issues must be "ruled upon by the trial court" to be preserved for review (quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002))).[4]

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[3] The post-conviction relief judge seems to be mis-using the word "ineffective" instead of the word "deficient" in analyzing the first prong of the Strickland test.

[4] Regardless, Respondent submits Petitioner failed to show prejudice from plea counsel's pre-trial preparation because none of the documents or evidence she allegedly failed to investigate were presented at the evidentiary hearing. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure conjecture"). Petitioner also should not be allowed to disavow his otherwise valid guilty plea based on alleged ignorance of information when: 1) he actually knew about the information at the time of his plea; and 2) his alleged ignorance is due to his own lack of candor with plea counsel. See Kolle, 386 S.C. at 597 n.7, 690 S.E.2d at 83 n.7 (Kittredge, J., dissenting) ("[A] defendant should not be permitted to successfully collaterally challenge a guilty plea on the basis of an involuntary plea tied to a claim of deficient representation where: (1) the alleged deficient representation was known to the defendant at the time of the guilty plea; and (2) the defendant knowingly testified falsely at the plea proceeding concerning plea counsel's representation.").

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

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

By: _____
ATTORNEYS FOR RESPONDENT

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Certiorari to Horry County

The Honorable John C. Hayes, III, Circuit Court Judge

JUSTIN RAYL,

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Bobby G. Frederick, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

This 13th day of July, 2015

Norma Bigbee
NORMA BIGBEE
LEGAL ASSISTANT