

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 24 2015

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Letitia H. Verdin, Guilty Plea Judge
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2015-000756

Brandon Garren,Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW3

ARGUMENT

 The PCR judge erred in finding Respondent was entitled to a new trial because Respondent failed to meet his burden of proving either that plea counsel was ineffective in not requesting a psychological evaluation or that he was prejudiced by the lack of said evaluation.4

 The PCR judge erred in finding Respondent was entitled to a new trial because Respondent failed to meet his burden of proving his guilty plea was involuntary.11

CONCLUSION15

QUESTIONS PRESENTED

1. Did the PCR judge err in finding Respondent was entitled to a new trial because Respondent failed to meet his burden of proving either that plea counsel was ineffective in not requesting a psychological evaluation or that he suffered any resulting prejudice?
2. Did the PCR judge err in finding Respondent was entitled to a new trial because Respondent failed to meet his burden of proving his guilty plea was involuntary?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Respondent at the December 2012 term of General Sessions for attempted murder (2012-GS-39-2677). Respondent waived presentment to the Grand Jury for criminal domestic violence of a high and aggravated nature (CDVHAN) (2012-GS-39-0311). (App.pp.77-80; pp.82-84). Frank Eppes, Esquire represented Respondent.

On January 31, 2013, Respondent pled guilty. The Honorable Letitia H. Verdin sentenced Respondent to concurrent sentences of 15 years for the lesser offense of assault and battery of a high and aggravated nature (ABHAN) and 10 years for CDVHAN. (App.p.33; p.77; p.81). Respondent did not appeal.

Respondent filed an application for post-conviction relief (PCR) on November 4, 2013 (2013-CP-39-1380). (App.pp.35-45). A hearing was held at the Pickens County Courthouse on December 15, 2014. (App.pp.52-70). Respondent was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an order filed March 12, 2015, the Honorable Eugene C. Griffith, Jr. granted post-conviction relief and ordered a new trial. (App.pp.72-76).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their

application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

- I. **The PCR judge erred in finding Respondent was entitled to a new trial because Respondent failed to meet his burden of proving either that plea counsel was ineffective in not requesting a psychological evaluation or that he was prejudiced by the lack of said evaluation.**

Certiorari is warranted in this case because the PCR judge erred in granting Respondent a new trial. The PCR judge erred in finding Respondent met his burden of proving both that plea counsel was ineffective in not requesting a psychological evaluation and that he was prejudiced as a result.

A.

At the guilty plea hearing, the plea judge advised Respondent of the sentences he was facing and Respondent said he understood. (App.p.7). Respondent stated he had discussed the charges with his attorney and that he was “most satisfied” with his attorney’s representation. (App.pp.8-9). Respondent stated he had not been coerced or promised anything in exchange for his guilty pleas. (App.p.10). Respondent waived his right to trial and stated he was guilty. (App.pp.10-13). The assistant solicitor noted there was no plea recommendation in Respondent’s case. (App.p.24; p.27).

The assistant solicitor recited the facts of the two charges, which he described at the outset as “really kind of rough.” (App.p.24). As to the CDVHAN charge on January 20, 2012, police responded to the scene and Respondent was screaming at the victim. Respondent had a pistol in his pocket. The victim “said that she knew [Respondent] was going to kill her.” The victim had “visible injuries to her face” and said Respondent

repeatedly struck her, swung an ax at her head, and pointed a gun at her.¹ (App.pp.24-25). As to the ABHAN charge on June 29, 2012, police responded to the scene because neighbors reported hearing the victim screaming. This victim is the same victim as in the prior CDVHAN charge. The victim was in a state of undress and her face was severely beaten.² The victim stated the assault occurred over 24 hours, that Respondent threatened her if she tried to leave, struck her with several objects, and forced drugs down her throat. Respondent fled the scene and was later found after he overdosed. (App.pp.25-27).

Plea counsel stated “my client obviously has some mental problems. He has very little memory of this period of time. He informs me that both of them take pills. He self-medicates for a variety of abnormalities.” (App.p.31). Plea counsel went on to describe Respondent’s blood disease and also relayed that he had discussed possible defenses with Respondent. (App.pp.31-32). Plea counsel stated Respondent “wants to get this behind him.” (App.p.32). Respondent’s mother referred to his “numerous health problems” and wanted “to try to help him with drug rehab. It was prescription drugs.” (App.p.32). While plea counsel requested a split sentence with a 3-5 year active sentence and probation, the plea judge stated “[t]his case is beyond [the] pale” and sentenced him to 15 years. (App.p.33).

B.

At the PCR hearing, Respondent stated he was incarcerated for 6 months before he pled guilty and met with plea counsel 2-3 times. (App.p.56). Respondent stated he

¹ Police found both the ax and the hole in the wall where the victim said the ax hit when it was swung at her head. (App.p.25).

² After being taken to the hospital, the victim was found to have several broken bones in her face. (App.p.26).

believed his mother requested he receive a mental evaluation. (App.p.57).

Plea counsel testified he visited Respondent at the jail and they reviewed the elements of the charges, the content of the discovery materials, and Respondent's version of events. (App.pp.63-64). Plea counsel testified the photographs "were fairly devastating to the case. The alleged victim was beat up pretty badly." (App.p.64). Plea counsel testified that, during the course of his representation, he did not see the need for Respondent to have a competency evaluation. (App.p.65). Plea counsel testified Respondent did not inform him of any prior mental health treatment or history. (App.p.66). Plea counsel testified that, in retrospect, he wished he had Respondent undergo a psychological evaluation for mitigation purposes. (App.p.66; p.67).

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent "met his burden of proving trial counsel should have requested that [Respondent] have a psychological evaluation before [Respondent] plead guilty. . . ." The PCR judge also found Respondent demonstrated prejudice "by showing that he did not understand the specifics of his guilty plea because of his mental incapacity." (App.pp.74-75).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has

been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

D.

Deficiency

The PCR judge erred in finding Respondent met his burden of proving plea counsel was deficient. Respondent failed to prove plea counsel erred in not requesting he undergo a psychological evaluation. Respondent presented no testimony or evidence that – at the time of the guilty plea hearing – he was not competent to plead guilty to these charges. Plea counsel testified he did not see the need for a competency evaluation and Respondent did not inform him of any prior mental health treatment or history. (App.pp.65-66). Plea counsel specifically testified he believed Respondent was competent at the time of the plea “and I continue to believe he is competent.” (App.p.66). As such, plea counsel cannot be found deficient for failing to request a competency evaluation. See, e.g., Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011) (holding plea counsel cannot be found deficient if she has no indication of the defendant's mental health history).

Furthermore, plea counsel's testimony that he wished he had retained a psychological evaluation for mitigation purposes was based upon his reflection after the guilty plea hearing. Plea counsel testified “[t]his case has been one that bothered me

since [Respondent] got his sentence” and “as I racked my brain about this case – and I think about it from time to time, because he has a great family. I have thought many times I really wish that we had taken the time to get a psychological evaluation.” (App.pp.65-66). Plea counsel also prefaced some of his comments with “as I go back and look at the case.” (App.p.67). It is clear plea counsel’s testimony was entirely the result of his rumination about the case after Respondent was sentenced. Plea counsel’s reflection does not amount to a finding of deficiency. See, e.g., McAfee v. Thurmer, 589 F.3d 353, 356 (7th Cir. 2009) (noting attorney “reflection after the fact is irrelevant to the question of ineffective assistance of counsel”); Wright v. Hooper, 169 F.3d 695, 707 (11th Cir. 1999) (noting that ineffectiveness is an issue decided by the courts and that “admissions of deficient performance by attorneys are not decisive”). Allowing the determination of prejudice to rest upon trial counsel’s admissions or beliefs takes the two-prong Strickland analysis away from the courts and could allow for self-serving hindsight to determine whether counsel’s performance was prejudicial. See Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) (“What decision [counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless, after more than a decade, for [counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.”). There is no probative evidence to support the PCR judge’s finding that plea counsel was deficient. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Prejudice

The PCR judge also erred in finding Respondent met his burden of proving he was prejudiced because there was no evaluation prior to the guilty plea hearing. Plea counsel testified he wished – in retrospect – that he had Respondent undergo a psychological evaluation for mitigation purposes. (App.p.66; p.67). Plea counsel never testified he believed an evaluation was necessary for competency purposes. In fact, plea counsel testified there were no issues with Respondent’s competency. (App.p.66). As such, the PCR judge erred in finding Respondent demonstrated prejudice “by showing that he did not understand the specifics of his guilty plea because of his mental incapacity.” There is no probative evidence to support the PCR judge’s finding that Respondent should have been evaluated for competency. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

More importantly, Respondent failed to meet his burden of proving the outcome of his case would have been different if he had received an evaluation. To sustain a claim that plea counsel was ineffective for failing to request competency hearing, the PCR applicant must show reasonable probability that he would have been found incompetent. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992). Respondent failed to demonstrate there was a reasonable probability either that – if a psychological evaluation had been performed – he would have (1) been found incompetent or (2) presented the evaluation as mitigation evidence and received a different sentence from the plea judge. Respondent failed to meet this burden of proof because he did not present a psychological evaluation at the PCR hearing. This Court has repeatedly held that, without such, his

claim of prejudice is purely speculative. In Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008), for example, the defendant alleged his trial attorney should have retained an expert witness to assist in countering the State’s allegation that he was sexually abused a child. The defendant, however, did not present an expert witness at his PCR hearing. This Court concluded that, as the defendant failed to present any expert testimony at the PCR hearing to support his claim, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense.” Id. at 530, 657 S.E.2d at 777 (citing Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.”)). Since Respondent failed to introduce evidence of a psychological evaluation at the PCR hearing, there is nothing in the record to support his argument that this evaluation would have had an impact upon his case. As such, the PCR judge’s finding that Respondent demonstrated prejudice by the lack of a psychological evaluation in his case is wholly speculative and there is no probative evidence to support this finding. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626

E.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance. As Respondent failed to meet his burden of proving ineffective assistance of plea counsel, the PCR judge erred

in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

II. The PCR judge erred in finding Respondent was entitled to a new trial because Respondent failed to meet his burden of proving his guilty plea was involuntary.

Certiorari is warranted in this case because the PCR judge erred in granting Respondent a new trial. The PCR judge erred in finding Respondent was under the influence of medication on the day of the guilty plea and that, as such, his guilty plea was involuntary.

A.

At the PCR hearing, Respondent stated he did not understand what he was doing on the day he pled guilty to these charges. (App.pp.57-58). In stark contrast, plea counsel testified Respondent appeared "to be following what was happening" at the plea hearing and never said he did not understand the proceedings. (App.p.67). Plea counsel testified his "perception, at the time, was that [Respondent] understood what was going on." (App.p.67).

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent "was under the influence of medication which affected his ability to understand what he was doing on the day of his plea. [Respondent] can demonstrate prejudice in this regard by showing that . . . he would not have pled guilty if he was not under the influence of medication at the time of his plea." (App.p.75).

B.

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). “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.” Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citation omitted).

C.

Deficiency

In order to prove his guilty pleas to these charges were involuntary, Respondent had the burden of proving plea counsel was ineffective. See Roscoe v. State, 345 S.C. at 20, 546 S.E.2d at 419. Respondent failed to meet this burden. While the PCR judge found Respondent was “under the influence of medication which affected his ability to understand” the plea proceedings, this finding is not supported by the record. At the guilty plea hearing, Respondent stated he was not under the influence of drugs. (App.pp.9-10). While plea counsel stated Respondent “always appears a little bit spacey and out of it to me” he testified Respondent appeared to follow along with and understand

the proceedings and never indicated he did not understand. (App.pp.66-67). As there was no indication Respondent did not comprehend the plea hearing because of his medication, plea counsel cannot be found deficient for having Respondent proceed with the plea hearing. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 (holding “a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct”) (emphasis added). There is no probative evidence, therefore, that Respondent either entered his guilty pleas involuntarily or that plea counsel would have been aware of such. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Prejudice

The PCR judge erred in finding Respondent demonstrated he was prejudiced because he would not have pled guilty if he had not been allegedly “under the influence of medication at the time of his plea.” Respondent failed to meet his burden of proving that he was on medication on the day he pled guilty or that he suffered ill effects from any medication. Respondent failed to provide a list of medications he was allegedly taking on the day of the guilty plea hearing or any expert testimony as to the effect of such medications. Without this information, it is speculative to conclude that Respondent was either taking prescription medication or that it diminished his ability to understand the guilty plea proceeding. See, e.g., Dempsey v. State, 363 S.C. at 370, 610 S.E.2d at 815 (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, “any finding of prejudice is merely speculative”). This is especially true because of plea counsel’s testimony at the PCR hearing that he believed Respondent understood the

proceedings at his guilty plea hearing.

Respondent bears the burden of proving his claims by competent evidence. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). He failed to do so. There is no probative evidence to support the PCR judge's finding that Respondent demonstrated he was prejudiced because he was under the influence of medication when he pled guilty. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

D.

Accordingly, Respondent failed to prove his guilty plea was involuntary and that plea counsel's representation was ineffective. See Roscoe v. State, 345 S.C. at 20, 546 S.E.2d at 419. As Respondent failed to meet his burden of proof, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR PETITIONER

August 24, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Guilty Plea Judge
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2015-000756

Brandon Garren,.....Respondent,

v.


State of South Carolina,..... Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in inter-agency mail, addressed to:

David Alexander, 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 24th day of August, 2015.


KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR PETITIONER



RECEIVED

AUG 24 2015

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

August 24, 2015

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

Re: Brandon Garren v. State of South Carolina
Appellate Case No: 2015-000756
Lower Case No: 2013-CP-39-1380

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** in the above-referenced case. The Appendix was filed July 31, 2015.

Sincerely,

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

KCR/jacc
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Victim Services Counselor