

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO MARLBORO COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-002429

RECEIVED

OCT 19 2016

S.C. SUPREME COURT

Vondell Malachi,..... Petitioner,

v.

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

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Attorney General

CAITLIN BAZAN HASTINGS
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ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUE PRESENTED

- I. The PCR court erred in finding that plea counsels provided effective assistance of counsel where Petitioner stated that he would not have pled guilty and would have insisted on going to trial if he had understood involuntary manslaughter could be a verdict option and where co-counsel admitted that Petitioner told him that he accidentally shot the decedent in a struggle over a gun, but co-counsel deferred advising Petitioner to lead defense counsel, who erroneously concluded that involuntary manslaughter was not a verdict option, and, therefore, did not advise Petitioner of that possibility.

STANDARD OF REVIEW

The Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge "if there is any evidence of probative value sufficient to support them." Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. "If no probative evidence exists to support the findings, the Court will reverse." *Id.* at 368-69, 610 S.E.2d at 814. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011).

STATEMENT OF THE CASE

In August 2007, the Marlboro County Grand Jury indicted Petitioner for assault and battery with intent to kill (2007-GS-34-0807). In July 2011, the Marlboro County Grand Jury indicted Petitioner for murder (2011-GS-34-0529), failure to stop for a blue light (2011-GS-34-0530), and unlawful conduct towards a child (2011-GS-34-0531). Wade R. Crow, Esquire, and Harry R. Easterling Jr., Esquire, (collectively, "plea counsel") represented Petitioner. On July 30, 2012, Petitioner pled guilty to assault and battery with intent to kill, the lesser-included offense voluntary manslaughter, failure to stop for a blue light, and unlawful conduct towards a child. The Honorable Edward B. Cottingham sentenced Petitioner to concurrent terms of ten (10) years for assault and battery with intent to kill, twenty-five (25) years for voluntary manslaughter, two (2) years for failure to stop for a blue light, and two (2) years for unlawful conduct towards a child. Petitioner did not appeal his plea or sentence.

Petitioner filed an Application for Post-Conviction Relief (PCR) on July 24, 2013. (App. p. 49). Respondent made a timely Return on May 30, 2014. (App. p. 53). The Honorable Thomas A. Russo ("the PCR judge") convened an evidentiary hearing on the application at the Darlington County Courthouse on July 27, 2015. (App. p. 55). Petitioner was present and represented by Tristan M. Shaffer, Esquire. Respondent was represented by Assistant Attorney General Joshua L. Thomas, Esquire. Judge Russo denied Petitioner's PCR application in an Order filed October 16, 2015. (App. p. 100).

A timely notice of intent to appeal was served on November 30, 2015. On August 5, 2016, Petitioner submitted his petition for writ of certiorari. This return to the petition for writ of certiorari follows.

ARGUMENT

I. The record contains substantial evidence of probative value to support the PCR judge's finding that Petitioner failed to prove that his guilty plea was involuntary.

Petitioner asserts that his guilty plea was made involuntarily and unknowingly. Specifically, Petitioner asserts that he would not have pled guilty had he known that "involuntary manslaughter could be a verdict option." (Pet. for Writ of Cert. p. 2). For the following reasons, Respondent contends that this issue is without merit and that substantial evidence of probative value exists to support the PCR judge's finding.

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel's performance was deficient, and (2) there is a reasonable probability that but for counsel's errors, the defendant 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 *Al-Shabazz v. State*, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (1999)). 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. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000)). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing," *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea." *Id.* (citing *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991); *State v. Hazel*, 275 S.G. 392, 271 S.E.2d 602 (1980)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal

inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir.1975).

The PCR judge found Petitioner failed to meet his burden of proving either deficiency of Plea Counsel or that he would have proceeded to trial but for the alleged deficiencies. (App. p. 104-05). The PCR judge found the testimony of Plea Counsel Wade R. Crow, Esquire, and Harry R. Easterling Jr., Esquire, very compelling and credible. (App. p. 104). Plea Counsel testified that they met with Petitioner numerous times. (App. p. 103). Plea Counsel also testified that they discussed the charges, potential sentences and all the evidence thoroughly. (App. p. 103-04). Plea Counsel also testified that Petitioner never indicated any interest of going to trial. (App. p. 103). Additionally, Plea Counsel testified that Petitioner completed a Plea Affidavit prior to his plea that discussed the rights Petitioner would be waiving as well as potential charges he would be facing. (App. p. 78, 84, 103). Further, the plea judge also discussed in detail the charges to which Petitioner was pleading guilty. (App. p. 20-22). Therefore, the PCR judge found that Plea Counsel “conducted a proper investigation, adequately conferred with Applicant, and were thoroughly competent in their representation.” (App. p. 19-20, 104).

Accordingly, Petitioner has failed to show that Plea Counsel’s advice was deficient, and that but for Plea Counsel’s advice, he would proceeded to trial rather than taking a plea. See *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

II. The record contains substantial evidence of probative value to support the PCR judge's finding that Petitioner failed to prove Plea Counsel ineffective.

Petitioner asserts Plea Counsel was ineffective in their representation. Specifically, Petitioner argues Plea Counsel was deficient by failing to address all applicable defenses in Petitioner's case. (Pet. for Writ of Cert. p. 2). For the following reasons, Respondent contends that this issue is without merit and that substantial evidence of probative value exists to support the PCR judge's finding.

In a PCR action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced Petitioner

such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. Because Petitioner pled guilty, he must show there is a reasonable probability that, but for plea counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

In the present case, there is ample probative evidence in support of the PCR judge's finding. Petitioner testified that he told Plea Counsel that he accidentally shot the decedent during a struggle for the weapon. (App. p. 103). Plea Counsel testified that they thoroughly went through the evidence with Petitioner and discussed several potential scenarios of how the shooting may have occurred; however, Plea Counsel testified that each potential scenario was not supported by the evidence. (App. p. 74-80, 83-85, 103-04). Plea Counsel testified that the evidence did not support a defense theory of accident or self-defense. (App. p. 74-80, 83-85, 103-04). Applicant also testified that he recalled Plea Counsel informing him that the evidence did not support an accident defense. (App. p. 69, 103). Additionally, the PCR court in its Order included a footnote in which it stated, "Based on a review of the record, the Court agrees with plea counsel's assessment that the evidence would not have supported theories of accident, self-defense, or involuntary manslaughter." See Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (counsel not ineffective for failing to advise of a potential defense where no evidence exists to support the defense). (App. p. 104).

Accordingly, Petitioner has failed to meet the two prongs of the Strickland test. As Petitioner failed to meet his burden of proving ineffective assistance of Plea Counsel, the PCR judge did not err in denying the 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 reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari.

Respectfully submitted,

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By:  James G. Smith
ATTORNEYS FOR RESPONDENT

October 19, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO MARLBORO COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

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VONDELL MALACHI,

Petitioner,

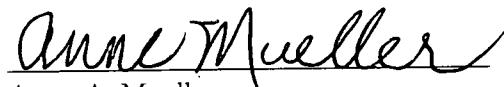
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STATE OF SOUTH CAROLINA,

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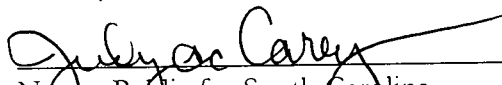
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, John H. Strom, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 19th day of October, 2016.



Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
19th day of October, 2016.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 5/14/2024



ALAN WILSON
ATTORNEY GENERAL

October 19, 2016

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OCT 19 2016

S.C. SUPREME COURT

Via Hand Delivery

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

RE: **Vondell Malachi v. State of South Carolina**
Appellate Case No.: 2015-002429

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

Sincerely,

Caitlin B. Hastings
Assistant Attorney General
SC Bar No. 102187

CBH/aam
Enclosures

cc: John H. Strom, Esquire (w/enclosure)