

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Maite Murphy, Circuit Court Judge

Kentrell Liburd, #357498 Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001449

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. "Whether trial counsel was ineffective and deficient in failing to properly investigate and failing to advise Petitioner concerning his right to not proceed with a plea after signing a plea agreement form but later learning before the entry of the plea in court that the State could not find two critical witnesses and that his co-defendant was found incompetent to stand trial, which prevented Petitioner from making a knowing and intelligent decision about whether he should proceed to trial and undermined the willful and voluntary nature of Petitioner's guilty plea?"
2. "Whether plea counsel's conduct so undermined the proper functioning of the adversarial process that the plea cannot be relied on as having produced a just result?"

RESPONDENT'S QUESTIONS PRESENTED

1. Whether plea counsel was ineffective in failing to properly investigate and advise Petitioner concerning his right not to proceed with a plea after signing a plea agreement when his codefendant was found incompetent to stand trial?
2. Whether plea counsel was ineffective in failing to properly investigate and advise Petitioner concerning the State's alleged inability to find two critical witnesses?

STANDARD OF REVIEW

In a post-conviction relief action, the proper standard of review is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). “This Court gives great deference to the post-conviction relief (PCR) courts findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). On review, this Court “gives great deference to a PCR judge’s findings where matters of credibility are involved.” Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). The petitioner bears the burden of proving the allegations in their application. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

STATEMENT OF FACTS

Procedural History

The Orangeburg County Grand Jury indicted Petitioner in June 2012 for murder and in December 2012 for armed robbery. App. p. 67-70. Margaret Hinds, Esq., (“counsel”) represented Petitioner on these charges. On October 22, 2013, Petitioner pleaded guilty to armed robbery and the lesser included offense of voluntary manslaughter before the Honorable Edgar W. Dickson. App. p. 1. Judge Dickson sentenced Petitioner to imprisonment for twenty-five years for voluntary manslaughter and ten years consecutive for armed robbery. App. p. 3, 18.

Petitioner filed an application for post-conviction relief (PCR) alleging:

- (a) Failure to Investigate
- (b) Due Process violations

An evidentiary hearing was convened before the Honorable Maite Murphy. App. p. 34. Jonathan D. Waller, Esq., represented Petitioner in the action. Judge Murphy denied relief and dismissed the application. App. p. 60-66. Petitioner filed a notice of appeal.

On September 8, 2016, Lara M. Caudy, Esq., filed a *Johnson* Petition for Writ of Certiorari on Petitioner’s behalf. On November 28, 2016, this Court granted Petitioner’s motion to substitute counsel to Clarissa Joyner, Esq., and withdraw his *Johnson* petition for writ of certiorari. Petitioner filed his second petition for writ of certiorari on December 28, 2016.

Facts Supporting Guilty Plea

Petitioner’s guilty plea involved two separate incidents, an armed robbery and a voluntary manslaughter.

While on a golf course, two men were robbed of their cell phones and credit cards by two black males in masks with handguns. App. p. 8. Petitioner confessed to taking part in that armed

robbery and gave law enforcement the name of his codefendant. App. p. 8. As part of plea negotiations, Petitioner reiterated the name of his codefendant on the record. App. p. 8.

Petitioner and two codefendants burglarized a house with three men inside. App. p. 9. During the burglary, Petitioner shot and killed one of the men inside. Petitioner's codefendant, Gregory Foye (hereinafter "Foye"), who was later found incompetent to stand trial, gave a statement to law enforcement detailing how events unfolded. App. p. 9, 45. In an interview with law enforcement, Petitioner confessed that he had a gun during the burglary and fired it during the commission of the burglary. App. p. 9, 50. The State alleged that it was Petitioner's gun which fired the fatal bullet. App. p. 9.

Testimony at PCR Hearing

Petitioner testified he met with plea counsel six times before pleading guilty. App. p. 51. During those meetings, they discussed the potential sentences carried by murder and armed robbery and the evidence the State would present at trial. App. p. 51. Petitioner claimed he learned Foye was found incompetent to stand trial about a week before he pleaded guilty. App. p. 44. Petitioner claimed he would not have pleaded guilty if he had known Foye was not competent before he signed his plea deal. App. p. 48.

According to counsel's notes, the State informed counsel of Foye's lack of competency on August 6, 2013, and counsel advised Petitioner accordingly on August 8, 2013, seventy-five days prior to the guilty plea. App. p. 55. She advised Petitioner the State still had overwhelming evidence against him, namely his confession, despite Foye's lack of competency. App. p. 55. Several days before Petitioner pleaded guilty, counsel went over a guilty plea checklist with Petitioner that fully laid out the negotiations, the negotiated sentence, and his constitutional rights. App. p. 56.

ARGUMENT

Respondent asserts Petitioner's first question contains two separate and distinct legal arguments and Petitioner's second question does not raise any new legal issues. Therefore, Respondent's Return separates Petitioner's first question into two arguments and has no substantive response to Petitioner's second question as it is answered by the first two arguments.

I. There is probative evidence to support the PCR court's finding that counsel sufficiently evaluated and apprised Petitioner of his codefendant's lack of competence and its impact on his chances at trial prior to his guilty plea.

This Court should deny certiorari because counsel effectively advised Petitioner of his codefendant's lack of competency and its significance to his case. Petitioner was also not prejudiced by any deficiency due to the overwhelming evidence against him.

A. Counsel's testimony that she met with Petitioner and advised him concerning his codefendant's incompetency seventy-five days before his guilty plea is probative evidence that contradicts Petitioner's claim and supports the PCR court's finding.

Counsel advised Petitioner of Foye's lack of competence and its effect on his case on multiple occasions prior to his guilty plea. App. p. 55. The PCR court found counsel's testimony persuasive and credible. App. 63. The PCR court found Applicant's testimony that he was not advised of Foye's lack of competency until less than a week before his plea lacked credibility. App. p. 44, 63. The PCR court's finding is supported by counsel's testimony and the notes counsel took of her meetings with Petitioner.

The only evidence supporting Petitioner's allegation, that counsel advised Petitioner he could not withdraw from his plea after signing the plea agreement, is his own self-serving testimony, which was found not credible by the PCR court. App. p. 44, 63. The plea was negotiated and Petitioner testified he understood the jail time he would be sentenced to and that

he was pleading guilty. App. p. 49. Counsel testified there were not any conversations about withdrawing Petitioner's negotiated plea and he understood the negotiations and ramifications of his plea. App. p. 56.

On August 6, 2013, the State advised counsel of Petitioner's codefendant's lack of competency. App. p. 57. On August 8, 2013, counsel noted that she met with and advised Petitioner of his codefendant's lack of competency and went over the evidence remaining against him in light of his codefendant's incompetency. App. p. 55. A few days before the guilty plea, counsel went over a guilty plea checklist with Petitioner, which covered all of the aspects of a guilty plea. App. p. 57. On October 22, 2013, seventy-five days after his first meeting with counsel, Petitioner pleaded guilty. App. p. 13. Petitioner testified he did not learn about his codefendant's lack of competency until after he signed his plea deal. App. p. 44. The PCR court found Petitioner's testimony lacked credibility. App. p. 63. "The circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony." Hughes v. State, 367 S.C. 389, 395, 626 S.E.2d 805, 808 (2006). The Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel, 390 S.C. 270, 701 S.E.2d 739 (2010).

Counsel's credible testimony directly contradicts Petitioner's unreliable testimony. Petitioner claims he was not advised of his codefendant's incompetence until after he signed the plea agreement and was then told by counsel he could not withdraw. App. p. 46. Counsel testified she told Petitioner about his codefendant's incompetence months before his plea hearing and never had any conversations with him about withdrawing from his plea. App. p. 55. The PCR Court found counsel's testimony credible and Petitioner's testimony lacked credibility. App. p. 63. Based on the testimony and evidence presented at the hearing, the PCR court found

counsel adequately advised Petitioner of his codefendant's lack of competency and its consequences. App. p. 64. Therefore, probative evidence exists in the record to support the PCR court's finding that counsel was not deficient.

B. Any deficiency by counsel was harmless because the evidence against Petitioner was overwhelming.

Petitioner failed to prove counsel's alleged deficiency prejudiced him because the State had overwhelming evidence of Petitioner's guilt. In order for Petitioner to prevail, any deficient performance must have prejudiced the petitioner such 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, 546 S.E.2d 417 (2001). Petitioner asserted he would have gone to trial if he had known about his codefendant's lack of competency. App. p. 44. However, Petitioner confessed to both the armed robbery and the voluntary manslaughter. App. p. 8-9. Thus, the PCR court correctly found there was overwhelming evidence against Petitioner. App. p. 62.

Probative evidence exists in the record to support the PCR court's finding that Petitioner was not prejudiced by any alleged deficiency of counsel.

II. Petitioner's brief mention of the potential availability of witnesses for trial was speculative and his right to confront his accusers was waived by his guilty plea.

Petitioner's allegation is purely speculative. At the evidentiary hearing, Petitioner claimed that, "They – they can't even locate the other two individuals because from my understanding I think they was illegal immigrants." App. p. 42-43. A claim is not probative evidence. Petitioner did not indicate how he knew the victims were not available to testify and qualified his statement with "from my understanding" and "I think." "Respondent failed to substantiate this allegation with any probative evidence... Mere speculation and conjecture on

the part of respondent is insufficient.” Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998). Petitioner’s speculation as to the availability of witnesses for trial is not probative evidence. Therefore, Petitioner’s statement is insufficient to prove prejudice.

Further, when Petitioner pleaded guilty he waived his right to confront his accusers. Here, Petitioner was fully advised and aware of the charges, possible sentences and enhancements. (App. p. 3-8). The plea judge reviewed Petitioner's constitutional rights with him at the plea. (App. p. 6-7). Petitioner indicated he understood the nature of the plea and was satisfied with his attorney. (App. p. 13). Finally, Petitioner indicated he knew the negotiated sentence he would receive. (App. p. 10-13).

Petitioner is attempting to assert his constitutional right to have the witnesses produced by the State. Petitioner waived that right when plead guilty. “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012).

Probative evidence exists in the record to support the PCR court’s finding that Petitioner did not prove any alleged deficiency of counsel or prejudice therefrom.

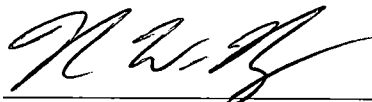
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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May 1st, 2017
Columbia, South Carolina

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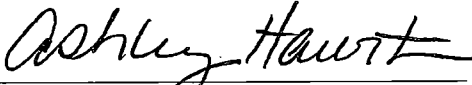
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

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This 1st day of May, 2017



ASHLEY HAWORTH
PARALEGAL