

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-001596

Brian Evans, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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PETITIONER'S ISSUE PRESENTED

Was Petitioner's guilty plea rendered involuntary due to plea counsel's ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution where plea counsel advised Petitioner the solicitor would file a motion to reduce his sentence within one year of his guilty plea based on substantial assistance provided by Petitioner to a corrections officer, which occurred while Petitioner awaited disposition of his case?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Kershaw County. Petitioner was indicted at the February 2011 term of the Court of General Sessions for Kershaw County for two counts of murder (2011-GS-28-0110; -0111). Petitioner was represented by Brian Shealey, Luke Shealey, and Tivis Sutherland, Esquires. Petitioner appeared before the Honorable DeAndrea G. Benjamin on October 14, 2014 and pleaded guilty as indicted. Pursuant to negotiations, Judge Benjamin sentenced Petitioner to concurrent terms of thirty years' imprisonment. Petitioner did not appeal his sentence or convictions.

Petitioner filed his application Post-Conviction Relief ("PCR") on October 9, 2014. App. 25-34. The State made its return on June 8, 2015. App. 35-40. Petitioner subsequently amended his application on March 7, 2016. App. 42. An evidentiary hearing into the matter was convened on March 29, 2016, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. App. 44-121. Petitioner was present and represented by Kristy Goldberg, Esquire. Assistant Attorney General J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Joette Scarborough from the South Carolina Department of Corrections, Brett Perry, Esquire of the Fifth Circuit Solicitor's Office, and Brian Shealey, Esquire, Petitioner's guilty plea counsel, also testified.

By Order signed and filed May 18, 2016, Judge Cooper denied Petitioner's PCR. App. 152-162. Petitioner subsequently filed a motion to alter/amend the judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This motion asked the court to modify the judgment on the grounds that the guilty plea was involuntary, as evidenced by plea counsel's testimony that his plea was conditioned on the negotiations as reflected on the sentencing sheet.

App. 163-168. By order dated July 20, 2016, and filed July 22, 2016, Judge Cooper denied Petitioner's motion to alter or amend the judgment of the court. App. 169.

A timely notice of intent to appeal was served on July 26, 2016. Appellate Defender Susan B. Hackett, Esquire of the South Carolina Commission of Indigent Defense - Office of Appellate Defense, filed a petition for writ of certiorari on March 8, 2017. This return follows.

STATEMENT OF FACTS¹

In late 2010, Petitioner and his wife, Elizabeth Marie Evans, were experiencing a difficult time in their marriage. Due to this difficulty, Petitioner was living with a gentleman named Jerry Geiger in northern Kershaw County. At some point between December 16th, 2010 and February 2, 2011, Petitioner was socializing with his wife and mutual friends. During that visit, things got heated and they left together in a Chevrolet automobile owned by Mrs. Evans. On that drive, they ended up on Flat Rock Road in northern Kershaw County where he strangled her and left her body in the woods. During a similar time frame, between January 23 and February 2 of 2011, Petitioner killed Jerry Geiger in his house in northern Kershaw County by striking him in the head multiple times with a stick of wood, binding and gagging him, and shooting him multiple times with a pistol.

After that, Petitioner, on at least one occasion, took the vehicle that belonged to Mr. Geiger to the Myrtle Beach area. On or about February 2, 2011, Mr. Geiger's family noticed that they had not seen or talked to him in a while. When they visited his home in an attempt to locate him, they found his body in the house. The family called law enforcement, which put out a BOLO upon realizing that his vehicle was missing. A Florence County Sheriff's Deputy saw the vehicle on the way back from a trip to the Myrtle Beach area and stopped the car, which Petitioner was driving. Kershaw County deputies went to Florence and took him into custody. On the ride back to Kershaw County, Petitioner not only admitted to having taken Mr. Geiger's life, but also his wife's. This was the first report of any kind that she was missing or harmed, as her body had not been discovered. In addition to this information, Petitioner provided law enforcement with detailed instructions on how and where to find her body.

¹ As recited by Deputy Solicitor Perry and affirmed by Petitioner at the entry of the guilty plea on October 14, 2013. App. 5-8.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court “gives great deference to the [PCR] court's findings of fact and conclusions of law.” Id. (quoting Dempsey, 363 S.C. at 368, 610 S.E.2d at 814). In a PCR action, the petitioner has 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 show 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.” Id. at 441, 334 S.E.2d at 814, citing Strickland v. Washington, 466 U.S. 668 (1984).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The question is whether counsel “provided representation within the range of competence required” in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814, citing Strickland, 466 U.S. at 687.

The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. With respect to guilty plea counsel, Petitioner must show there is a reasonable probability that, but for 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 regard to an involuntary guilty plea claim, a petitioner asserting a constitutional violation 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) (citations omitted). A Petitioner who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, Petitioner 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). A petitioner alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56. Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

The record must establish Petitioner had a full understanding of the consequences of his plea and the charges against him. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct.

App. 2007), citing Boykin v. Alabama, 395 U.S. 238, 242 (1969). In addition, statements “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., citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). “In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.” Id. at 138–39, 654 S.E.2d at 874, citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997). Cf. Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) (reversing the PCR court’s denial of relief and finding fact that Petitioner was informed of the sentencing range was irrelevant in prejudice analysis and that Petitioner presented sufficient evidence to show prejudice where he was under the impression the solicitor would not make a sentencing request).

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant’s counsel, or both.” Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000), citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). Further, “[a] guilty plea is a solemn, judicial admission of the truth of the charges against [the applicant]; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton, 376 S.C. at 137–38, 654 S.E.2d at 874, citing Blackledge v. Allison, 431 U.S. 63 (1977).

ARGUMENT

There is probative evidence in the record to support the PCR Court's finding plea counsels were not ineffective when they advised Petitioner that the solicitor would file a motion to reduce his sentence within one year of his guilty plea based on substantial assistance provided to a corrections officer that occurred prior to disposition of his case.

Petitioner asserts plea counsels were ineffective for advising him to plead guilty, in part based on assurances that the solicitor would file a motion for substantial assistance² after the entry of the plea. He states that, had he known these conditions for which he negotiated would not have been met in the way he anticipated, he would have preferred to take two separate murder charges to trial. App. 74;13-25. In support of this argument, he alleges that the erroneous advice induced a guilty plea, as claims of involuntary guilty pleas must be couched in terms of ineffective assistance of counsel. Al-Shabazz, 338 S.C. at 363-64, 527 S.E.2d at 747. As with any other ineffective assistance of counsel claim, the two-pronged test adopted in Strickland "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "[I]n the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel," the deficiency prong of the Strickland test requires "an inquiry into whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

² The terms "substantial assistance" and "downward departure" were used interchangeably at the evidentiary hearing, and will also be used interchangeably in this filing depending on their use in the testimony provided.

Respondent is in agreement with Petitioner's statement of the law; however, Respondent disagrees with the evidence as presented. The uncontroverted testimony presented at the evidentiary hearing was that Petitioner pled guilty based on the understanding that he would be in statewide protective custody and that the solicitor would move for substantial assistance. App. 49-77 (generally, Petitioner's testimony at PCR evidentiary hearing) and 59;12-18 (Petitioner's specific response to those questions). This was echoed by Deputy Solicitor Perry, who recalled statewide protective custody particularly being a major sticking point for Petitioner (App. 88;16-89;11) and that downward departure was discussed (App. 91;15-94;22), as well as by plea counsel Shealey who also remembered the protective custody issue being very important to the Petitioner, as well as discussions regarding the potential for substantial assistance (App.113;25-114;5). The difference therein lies between what plea counsel told Petitioner and what Petitioner understood. Testimony from plea counsel Shealey showed he felt he had as close to a guarantee as one could get regarding the protective custody issue (App. 116;19-22), and that he believed he made it very clear to Petitioner that any motion for substantial assistance would have to come from the solicitor's office: "Brian was made to understand we can't -- we could not guarantee any kind of downward departure that a judge would give. It could be nothing. It could be one day. It could be six months." App. 110. He further testified he felt the same way about assuring the Petitioner that such a motion would be filed, though the State would have to file it. App. 111. He provided similar testimony regarding Petitioner's request for statewide protective custody, though that is not at issue in this appeal. The PCR Court found this testimony persuasive and credible, as well as in keeping with the statute. App. 158. The Court specifically found:

The statute unambiguously sets forth that it is incumbent on the State, not defense counsel to move for a sentence reduction hearing. It is not logical or prudent to find counsel ineffective for failing to do something which he has no statutory authority to do. Such a finding would effectively misconstrue the statute to

include defense counsel as a party with an obligation to move for a sentence reduction. In construing a statute, the Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 474 (2008); Lancaster Cty. Bar Ass'n. v. S. Carolina Comm'n on Indigent Def., 380 S.C. 219, 222, 6709 S.E.2d 371, 373 (2008). Such a finding of ineffectiveness and its resulting effect on statutory interpretation would be absurd.

App. 159.

In evaluating this issue from another angle, the PCR Court found Deputy Solicitor Perry's testimony regarding the motion was credible, and included that he agreed to file the motion for substantial assistance in anticipation of Petitioner providing evidence in another pending case. Perry testified he was aware of the earlier help that Petitioner provided a corrections officer during a fight in county detention, and this was taken into consideration when offering Petitioner the mandatory minimum sentence, rather than in the potential filing of a motion. App. 98;24-99;1. Deputy Solicitor Perry further testified that when the other case ended by the defendant pleading guilty, he did not file a motion for substantial assistance because he had nothing on which to base the motion and warrant its filing. Lastly, he testified that he believed filing the motion would be asking the plea judge to impose an illegal sentence, as it would reduce Petitioner's time to below the mandatory minimum. App. 158. In this vein and based on this testimony, the PCR Court denied relief because the plea judge would have been very unlikely to grant the motion because 1) it would not be made in accordance with the statute if it were based on the assistance provided prior to conviction, 2) it would take the sentence below the mandatory minimum making it illegal, and 3) the weight of evidence and brutality of two separate murders would weigh heavily against Petitioner. App. 160.

The PCR Court made a specific finding Petitioner's testimony that he would have gone to trial on two separate murder charges was not credible. App. 159. This was based on the

testimony from plea counsel that Petitioner's greatest concern was being placed in protective custody. Though Petitioner testified he had previously proceeded to trial on one of the charges which resulted in a mistrial, this does not constitute the undisputed testimony required to overcome the prejudice test in Strickland and its related case law. Specifically, "[t]he defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Petitioner's testimony is certainly disputed by the testimony of both Deputy Solicitor Perry and plea counsel. The testimony at the evidentiary hearing, as well as in the record of the guilty plea, shows Petitioner had a full understanding of the conditions of his plea, including the important fact that neither the statewide protective custody nor the substantial assistance motion were guarantees. Such an understanding is required for a plea to be valid. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991), citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Similarly, a plea cannot be conditional. State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001). Petitioner's acceptance of the negotiated sentence and plea entry were not conditioned upon the satisfaction of the two negotiated terms that have been discussed, and above-referenced testimony reflects that he understood that these were requests and not guarantees. Based on the evidence in the record, all of these understandings and safeguards were satisfied, and there was no prejudice experienced by Petitioner due to any fault of plea counsel. The work of all plea counsel was substantially above the understood level of "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688.

Though it is unfortunate that Petitioner did not receive the relief that he anticipated, it is not due to any ineffective performance on the part of trial counsel. It is clear from testimony and

the record that Petitioner was aware of the limitations of the negotiated terms accompanying his guilty plea. For the above-stated reasons, this petition for writ of certiorari has no merit and must be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's 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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BRIAN FRANKLIN EVANS,.....Petitioner,

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STATE OF SOUTH CAROLINA,.....Respondent.

CERTIFICATE OF SERVICE

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

Susan B. Hackett, Esquire
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Appellate Defense
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This 23rd day of August, 2017



FELICIA V. HAYES
Legal Assistant For Respondent