STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
MAY 16 2018
S.C. SUPREME COURT

Certiorari to Oconee County
The Honorable Jocelyn J. Newman, Circuit Court Judge

Appellate Case No. 2017-001653

Gregory F. Young,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar #79054

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S QUESTION PRESENTED

Is there probative evidence in the record to support the PCR court's finding plea counsel was not ineffective for declining to request a competency evaluation of Petitioner where Petitioner presented no evidence of incompetency and Counsel testified she had no reason to believe Petitioner did not understand what he was doing by accepting a guilty plea to a lesser-included offense in order to avoid a potential life sentence?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Petitioner was indicted at the June 2014 term of the Oconee County Grand Jury for two counts of Criminal Sexual Conduct (CSC) with a Minor – First Degree (2014-GS-37-0691, -0692). Petitioner was a friend of the victim's mother, and regularly babysat victim, a nine-year-old girl. App. pp. 7-8. Petitioner digitally penetrated victim's vagina, then told her it was their secret and instructed her not to tell anyone else. App. pp. 8.

On January 15, 2015, Petitioner waived presentment of an indictment for one count of CSC – Second Degree (2015-GS-37-0088). On that same date, Petitioner appeared before the Honorable Eugene C. Griffith, Jr., and pleaded guilty as indicted to the charge of CSC – Second Degree. Petitioner's charges under the 2014 indictments were dismissed in exchange for his plea. Petitioner was represented by Suzanne E. Earle, Esquire (Counsel). Judge Griffith sentenced Petitioner to a term of imprisonment of twenty years, as recommended by the State, and required him to register as a sex offender. Petitioner did not appeal his conviction or sentence.

Petitioner timely filed his application for post-conviction relief (PCR) on August 20, 2015. An evidentiary hearing was convened on June 27, 2017, at the Anderson County Courthouse before the Honorable Jocelyn J. Newman. Rodney Richey, Esquire, represented Petitioner. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel testified for the State. The PCR court found Petitioner received effective assistance of counsel and dismissed Petitioner's application in its entirety by order signed July 25, 2017, and filed July 31,

2017. Petitioner filed a Petition for a Writ of Certiorari to this Court on March 2, 2018. This Return to the Petition for a Writ of Certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, ___ S.C. ___, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

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). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, an applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance

by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. 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. With respect to guilty plea counsel, an applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

ARGUMENT

Petitioner asserts Counsel was deficient in for declining to request a competency evaluation of Petitioner prior to his guilty plea and contends Counsel was "on notice" that his "competency was at issue." PWC pp. 3-4.

There is probative evidence in the record to support the PCR court's finding Counsel was not ineffective for declining to request a competency evaluation of Petitioner where Petitioner presented no evidence of incompetency and Counsel testified she had no reason to believe Petitioner did not understand what he was doing by accepting a guilty plea to a lesser-included offense in order to avoid a potential life sentence.

Before a defendant may plead guilty, it must be established that he is competent and his decision to plead guilty is a knowing and voluntary one. Sims v. State, 313 S.C. 420, 423-24, 438 S.E.2d 253, 254 (1993). The test for competency is the same whether a defendant chooses to plead guilty or go to trial – namely, "whether the defendant has the present ability to consult with his attorney with a reasonable degree of rational understanding" and "a rational as well as a factual understanding of the proceedings against him." Id. at 422–23, 438 S.E.2d at 254. When a PCR applicant raises issues of competency in the context of a guilty plea, the two-prong Strickland analysis still applies. Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 844–45 (2017). However, because of the nature of the claim, deficiency and prejudice are intertwined. Id. Once a PCR applicant has established his counsel was deficient in failing to obtain a mental competency evaluation, he is entitled to relief if he demonstrates a reasonable probability he was incompetent at the time he pled guilty. Id. at 22, 795 S.E.2d at 845 (citing Matthews v. State, 358 S.C. 456, 458–60, 596 S.E.2d 49, 50–51 (2004)); Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

In the instant case, Petitioner has not met his burden of proving deficient performance by plea counsel, nor has he presented any evidence whatsoever that he was incompetent at the time of the plea, such as to support a prejudice finding. The plea hearing transcript clearly reflects Petitioner was competent and entered into his plea freely and voluntarily. See Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (holding defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both."). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, Op No. 2015-000756 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 60).

The plea judge explained the charges to Petitioner in detail, including the waiver of presentment, the dismissal of his other charges, and the State's recommendation of a twenty-year sentence, and Petitioner indicated he understood. App. pp. 3-4, 7. Next, the judge specifically inquired as to Petitioner's mental condition at that time, and Petitioner testified he knew why he was in court and what was happening, and he understood the judge's questions to him. App. pp. 4-5. Additionally, the plea judge thoroughly explained Petitioner's constitutional right to a jury trial and to put up a defense on his own behalf and questioned Petitioner as to whether he understood those rights and wished to give them up in order to plead guilty instead. App. pp. 5-7. Petitioner indicated he did. App. p. 7. Petitioner further admitted he was guilty of the offense and agreed with the facts presented by the State at the plea. App. pp. 8-9, 14. When asked whether he had understood his conversations with Counsel, Petitioner stated, "Yes sir. She explained it to me downstairs a while ago." App. p. 13. Petitioner indicated an understanding

that all of the charges arose from the same incident with the same victim, and his guilty plea would resolve every outstanding charge on the matter. App. pp. 11-13.

Petitioner contends his response to the judge's next question, as to whether Petitioner was satisfied with the advice Counsel had given and the resolution being reached, indicates he was not sufficiently competent to enter the plea. Petitioner responded, "I tried to understand what she was talking about, sir." App. p. 13. The judge then explained the plea deal allowed Petitioner to plead to a lesser-included charge and avoid a potential life sentence. App. pp. 13-14. Petitioner engaged in an off-the-record discussion with Counsel, then indicated he understood. App. p. 14. Additionally, when Petitioner and Counsel explained his educational limitations and stated he had a hard time understanding consequences, the plea judge questioned Petitioner a second time as to whether he understood what he was pleading guilty to and whether he wished to do so. App. pp. 15-17. Petitioner unequivocally stated Counsel had explained the agreement to him and he wished to plead guilty. App. pp. 16-17.

Further, at other times, Petitioner demonstrated an ability to seek clarification when necessary. For example, when the plea court explained this conviction was a most serious strike that could be used against him if he were later charged with another most serious offense, Petitioner asked, "You mean like if I get charged with this again?" App. p. 10. The plea judge explained it could be any most serious charge and gave examples, and Petitioner then indicated his understanding. App. p. 10. Taken as a whole, then, the plea transcript reflects the plea court inquired multiple times whether Petitioner understood the plea agreement, his option to proceed to trial and present a defense instead of pleading guilty, and whether he was entering the plea freely and voluntarily, and Petitioner affirmed. Additionally, when Petitioner indicated potential

confusion or misunderstanding, the plea court either gave him an explanation or allowed him time to confer with Counsel until Petitioner indicated he understood.

Moreover, at the evidentiary hearing, when asked by his PCR attorney why he felt a competency evaluation should have been done, Petitioner explained it was because he could not read or write, not due to any mental health issues. App. p. 60. However, Petitioner never alleged or explained how his inability to read or write impacted his ability to assist Counsel with his defense or prevented him from understanding what was happening at his plea hearing. He merely offered conclusory testimony that he did not understand. App. p. 60.

On the other hand, Counsel testified she had no reason to believe Petitioner did not understand what he was doing by accepting the guilty plea, she felt he could distinguish right from wrong and he understood the charges against him, and she had no reason to believe a competency evaluation was necessary. App. pp. 67, 75-76. She testified Petitioner never discussed wanting a competency evaluation, although he did tell her he had a limited education. App. p. 67. Counsel's testimony also established Petitioner's participation in exploring potential defenses, as Counsel testified he gave her names of witnesses and suggestions for investigation he wanted done. App. pp. 72-74. Petitioner contends, because Counsel testified she had to explain to Petitioner repeatedly the evidence of the victim's sexual history would not be admissible at trial and therefore wasn't an avenue of investigation she was willing to pursue, Counsel should have known Petitioner's competency was in question. PWC p. 3-4. However, Counsel specifically testified she felt Petitioner understood why she could not pursue that defense, but he disagreed with her assessment.[1] App. p. 74. She also testified she felt Petitioner

[1] Petitioner has not alleged Counsel's legal advice as to the admissibility of such evidence or viability of such a defense was incorrect or deficient in any manner.

understood the plea offer for twenty years was significantly better than risking a conviction at trial. App. p. 76.

Petitioner compares his case to Matthews v. State, in which this Court found Matthews's trial counsel deficient for failing to request a competency hearing, *where Matthews presented the testimony of a psychiatrist at the PCR hearing* to establish his incompetency at the time of trial. 358 S.C. 456, 596 S.E.2d 49 (2004) (emphasis added). Matthews is easily distinguishable, as Petitioner admits, because Petitioner did not present any testimony, lay or expert, to support his contention of incompetency. Petitioner also likens his case to Lee v. State, wherein this Court upheld the PCR court's denial of relief, despite finding Lee had established a reasonable probability he was incompetent at the time of his plea and, therefore, was prejudiced by the lack of an evaluation. 396 S.C. 314, 321-22, 721 S.E.2d 442, 446-47 (2011). In Lee, this Court found there was sufficient evidence in the record to support the PCR court's finding plea counsel was not deficient because she was not on notice of a competency issue where she was never informed of Lee's previous mental health history and he seemed to understand all of his conversations with her prior to the plea. Id. at 322, 721 S.E.2d at 447.

This Court most recently addressed these issues in Garren v. State and found neither deficiency nor prejudice where the defendant did not present any evidence his plea counsel should have been on notice of a mental health issue or that there was a reasonable probability he would have been deemed incompetent at the time of the plea. Op No. 2015-000756 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 60-61); see also Jeter v. State, 308 S.C. 230, 417 S.E.2dd 594 (1992) (upholding the PCR court's finding neither deficiency, because trial counsel had no reason to suspect incompetency from his conversations with Jeter, nor prejudice, because Jeter failed to show there was a reasonable probability he would have been found

incompetent at the time of his trial). Petitioner's case is similar to Garren and Jeter. Although Counsel in this case was aware Petitioner had difficulty reading and writing, she testified she believed from her conversations with him that he understood the charges and allegations against him, he was able to assist with formulating a defense and investigation into the allegations, and it was Petitioner's choice to enter the guilty plea rather than proceed to trial. App. pp. 67, 75-76. In the absence of any evidence to the contrary, she "reasonably relied on [her] own perceptions," and her "failure to seek a psychiatric evaluation was not outside the range of reasonable professional assistance." Jeter, 308 S.C. at 233, 417 S.E.2d at 596.

Further, as discussed above, other than a single conclusory, self-serving statement he did not understand the plea hearing, Petitioner did not present any testimony to establish a reasonable probability he would have been deemed incompetent at the time of the plea. See Garren, Op No. 2015-000756 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 63-64) ("[T]he only evidence in the record supporting Garren's claim is his own PCR testimony... that he did not recall or understand the plea proceedings. Even under our deferential standard of review, this testimony alone is insufficient to establish Garren's plea was involuntary."). Despite Petitioner's contention, one line in the plea transcript does not prove incompetency. Indeed, after Petitioner indicated some confusion about the agreement, the plea judge gave him additional time to confer with Counsel, after which he then repeatedly affirmed his understanding of the agreement. App. pp. 13-17. Therefore, even if this Court finds Counsel was sufficiently "on notice" of a competency issue such as to establish deficient performance for failing to have Petitioner evaluated, Petitioner cannot show prejudice because all he has offered are "vague assertions" of incompetency, which "fall short as a matter of law." Id. at 64. Accordingly, this Court should uphold the findings of the PCR court and deny the Petition.

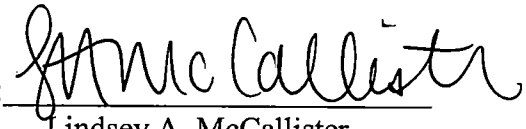
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient in declining to request a competency evaluation, nor was Petitioner prejudiced by the lack of one, and Petitioner's guilty plea was freely and voluntarily given. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

May 16, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 16 2018
S.C. SUPREME COURT

Certiorari from Oconee County
Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-001653

GREGORY F. YOUNG, #362732 PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, 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:

Victor R. Seeger, Esquire
1330 Lady Street
Suite 401
Columbia, South Carolina 29201

This 16th day of May, 2018

Camille Henry
Legal Assistant