

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas
The Honorable Jocelyn Newman, Circuit Court Judge

RECEIVED
AUG 29 2018
S.C. SUPREME COURT

Appellate Case No. 2017-001242

RYAN TROJAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

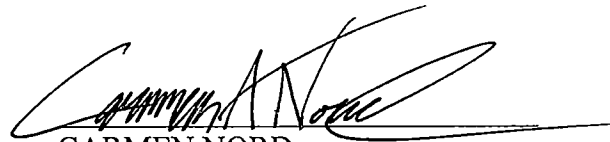
Respondent.

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:

Ms. Vicki D Koutsogiannis
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This 29th day of August, 2018


CARMEN NORD
Legal Assistant

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County
The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2017-001242

Ryan F. Trojan,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

- I. Is there probative evidence in the record to support the PCR court's finding Counsel was not ineffective in his preparation of the case prior to the guilty plea being entered because the medical records and LLR records were not a factor in Petitioner's decision to plead guilty, and in any event, Petitioner did not produce or introduce any medical records at the PCR hearing to support his contention the victim did not suffer serious injury, so Petitioner has not proved prejudice?

- II. Is there probative evidence in the record to support the PCR court's finding Petitioner enter into the guilty plea freely and voluntarily?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Kershaw County Clerk of Court. Petitioner was indicted at the October 2013 term of the Kershaw County Grand Jury for attempted murder (2013-GS-28-0941). Supp. App. 5-6. He was represented by Ronald W. Moak, Esquire. App. p. 65. Brett Perry, Esquire, prosecuted the case on behalf of the State. App. p. 65. On July 9, 2014, Petitioner pleaded guilty without recommendation or negotiation to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) before the Honorable DeAndrea G. Benjamin. App. pp. 65-67. Judge Benjamin sentenced Petitioner to eleven years of imprisonment. App. p. 107. He did not appeal his plea, conviction, or sentence. App. p. 2.

Petitioner filed an Application for Post-Conviction Relief (PCR) on July 1, 2015, with amendments filed August 26, 2016, alleging, among other things, Counsel was ineffective for failing to obtain the victim's medical records and records of the victim's participation in mixed martial arts (MMA) fighting from DHEC. App. pp. 110-16; Supp. App. pp. 111-13. Respondent made its Return December 21, 2015, requesting an evidentiary hearing be held on Petitioner's allegations. Supp. App. pp. 18-24. An evidentiary hearing was convened on September 1, 2016, at the Richland County Courthouse before the Honorable Jocelyn Newman. App. p. 13. Petitioner was present at the hearing and represented by James R. Snell, Jr., Esquire. App. pp. 13-14. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General represented Respondent. App. p. 13.

At the hearing, Petitioner testified on his own behalf. App. pp. 25-40. Counsel and Daniel Grigg, of the South Carolina Department of Labor, Licensing, and Regulation (LLR), also testified. App. pp. 15-24, 40-61. The PCR court had before it a copy of the records of the

Kershaw County Clerk of Court, Petitioner's records from the South Carolina Department of Corrections, the application and amended application, the State's Return, and the guilty plea transcript. App. p. 1. The PCR court found Petitioner received effective assistance of counsel, the plea was entered into freely and voluntarily, and dismissed Petitioner's application. App. p. 9. Petitioner filed a Petition for a Writ of Certiorari to this Court, along with an Appendix, on October 16, 2017. Respondent then filed a Motion to Compel Petitioner to Supplement Appendix and to hold the time limits for filing a Return to Petition for Writ of Certiorari in abeyance until the Supplemental Appendix was filed. This Court granted Respondent's motion by Order dated January 17, 2018. Petitioner filed the Supplemental Appendix on April 27, 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, 422 S.C. 174, 810 S.E.2d 836 (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. Id. at 180, 810 S.E.2d at 839 (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. at 180-81, 810 S.E.2d at 839-40. 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, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove 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 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

STATEMENT OF THE FACTS

On the night of July 13, 2013, and into the early hours of the next morning, Petitioner attended a birthday party, at which the victim, Dillon Robertson (Robertson), was also present. App. p. 69. There was a history of bad blood between Petitioner and Robertson arising from a physical altercation involving the two a few months earlier. App. p. 70. Other partygoers attempted to provoke another fight between Petitioner and Robertson, so Robertson and his friends left the residence. App. p. 70. According to Petitioner, he and his friends also started to leave, but Robertson then returned to the home. App. p. 75. A member of Robertson's group had forgotten a cellphone at the house, so after calling the homeowner and receiving permission to return, Robertson and a friend returned to the house to look for the phone. App. p. 70. Petitioner then pulled his car up behind Robertson's car, blocking Robertson's exit. App. pp. 70, 75. As Robertson approached the house the second time, Petitioner got out of his car and hit Robertson in the head from behind with a metal baseball bat. App. p. 80. Petitioner then fled the scene. App. p. 80. Robertson sustained extensive injuries to his head and face, resulting in hospitalization. App. pp. 71, 80.

ARGUMENT

Petitioner asserts Counsel rendered ineffective assistance in preparing the case for a guilty plea and during the plea, and the plea was not knowingly and voluntarily entered. Specifically, Petitioner contends Counsel was ineffective for failing to obtain the victim's medical records and records from the Department of Labor, Licensing, and Regulation (LLR) showing the victim participated in a MMA fight eight months after the incident.

- I. **There is probative evidence in the record to support the PCR court's finding Counsel was not ineffective in his preparation of the case prior to the guilty plea being entered because the medical records and LLR records were not a factor in Petitioner's decision to plead guilty, and in any event, Petitioner did not produce or introduce any medical records at the PCR hearing to support his contention the victim did not suffer serious injury, so Petitioner has not proved prejudice.**

Petitioner contends Counsel should have obtained the victim's medical records because the records may have changed Petitioner's decision to plead rather than go to trial or may have prompted the State to offer Petitioner a better plea bargain. PWC p. 6.

At the evidentiary hearing, Counsel credibly testified he did not attempt to obtain the medical records or LLR records because Petitioner decided to plead guilty, which made obtaining those records unnecessary. App. pp. 56-57. Counsel also testified the defense was aware Robertson had participated in some kind of fight or boxing match prior to the plea, and he would have attempted to obtain the records if the case had continued to trial. App. pp. 60-61. Notably, Counsel testified Petitioner was aware the defense had not yet obtained the medical records when Petitioner decided to plead guilty. App. pp. 52-53. However, during his guilty plea, Petitioner acknowledged Robertson "suffered extensive head injuries from behind," including broken teeth and a "crushed" nasal cavity. App. pp. 80-81, 85-86. At the evidentiary hearing, Petitioner did not introduce the medical records he claims Counsel should have obtained. App. pp. 11-63.

Although Petitioner introduced the testimony of Daniel Grigg, Deputy Director of LLR, who testified the victim applied for and was granted a license to fight one MMA bout in the summer of 2014 (a year after the incident), the record itself was not introduced into evidence, nor were any medical records pertaining to the injuries the victim suffered on the night of the crime. App. pp. 13, 17-18. Therefore, there is no evidence in the record to refute Petitioner's acknowledgement and agreement at the guilty plea that the victim suffered extensive injuries to his head and face as a result of Petitioner striking him with a metal bat. App. pp. 80-81, 85-86. Accordingly, Petitioner has not met his burden of proving prejudice. Because Petitioner's allegation the victim's medical records would have changed the outcome of his case is supported only by speculation, Petitioner has not met his burden of proving he was prejudiced by Counsel's decision not to obtain the records. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Therefore, the PCR court correctly found Counsel was not ineffective in his preparation of the case.

II. There is probative evidence in the record to support the PCR court's finding Petitioner enter into the guilty plea freely and voluntarily.

Petitioner contends he told Counsel he wanted to go to trial, but Counsel told him to "try [the plea] first." PWC pp. 7-8. Petitioner also contends the "rushed nature" of the plea rendered it involuntary. PWC p. 8. However, although Petitioner testified at the evidentiary hearing Counsel never reviewed discovery or discussed his right to a trial with him, the record of the plea hearing clearly reflects Petitioner was informed of his constitutional rights to a jury trial and to present a defense to these charges, and he told the plea judge he wished to them up in order to plead guilty. App. pp. 83-84. Additionally, Petitioner informed the plea court that no promises or threats were made in order to induce him to plead guilty, and, when Petitioner did have

questions or seemed unsure of how to proceed, the plea court paused the proceedings to give Petitioner further time to talk with Counsel. App. pp. 78, 84-85. Ultimately, the PCR court found Petitioner's testimony on the issue of whether his plea was involuntary to be not credible. App. p. 7.

Counsel testified he discussed the case with Petitioner, including why self-defense was not viable, they discussed what would happen in the plea hearing and what the judge might ask Petitioner, and he explained to Petitioner the difference between attempted murder (the original charge) and ABHAN (the charge to which Petitioner ultimately pleaded). App. pp. 50-51. Counsel further testified he and Petitioner discussed the option of trying the case, and Petitioner instead decided to plead guilty in the hope it would reduce the length of his sentence. App. pp. 51-52.

An applicant 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, 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). An applicant 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, the record must establish the defendant 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)). 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)). “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)).

“The general rule is that guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including the claims of a violation of a constitutional right prior to the plea. Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970), modified and vacated on other grounds, 408 U.S. 937 (1972)). “A guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant; thus, an applicant’s right to contest the validity of such a plea is generally 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)). Admissions “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)).

The PCR court ultimately found Petitioner’s testimony on this issue was not credible, and the record of the plea hearing clearly showed Petitioner entered into the guilty plea knowingly and voluntarily. App. pp. 7, 9. Petitioner has presented no evidence or credible testimony as to why the statements he made during his guilty plea affirming its voluntariness should now be considered invalid. Conversely, there is probative evidence in the record, namely Counsel’s

testimony and the record of the plea hearing, to support the PCR court's finding the plea was entered into knowingly and voluntarily.

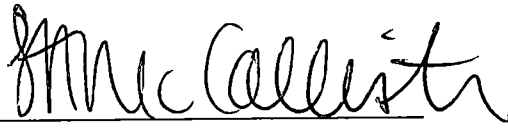
CONCLUSION

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 ineffective 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,

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ATTORNEYS FOR RESPONDENT

August 29, 2018



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AUG 29 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 29, 2018

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

Re: Ryan F. Trojan v. State of South Carolina
Appellate Case No. 2017-001242
Lower Court Case No. 2015-CP-28-0639

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister
Assistant Attorney General
SC Bar No. 79054

LM/can
Enclosures

cc: Vicki D. Koutsogiannis, Esquire (2 copies)