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May 24, 2019

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

RE: David Kucinski #373636 v. State of South Carolina
2018-CP-29-0536

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Kucinski.

Best regards,



Donae A. Minor, Esq.
Attorney at Law

cc: David Kucinski (#373636)
Samuel L. Key
Lancaster County Clerk of Court
Office of Appellate Offense

RECEIVED

MAY 31 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2018-CP-29-0536

David Kucinski, #373636, Petitioner,

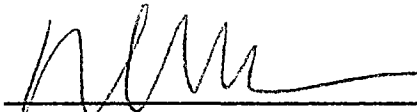
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, David Kucinski, appeals the order of the Honorable Paul M. Burch, dated May 13, 2019, and filed May 16, 2019.

May 28, 2019


DONAE A. MINOR, ESQUIRE
Minor Law Offices, LLC
1750 SC Highway 160 West,
Suite 101-259
Fort Mill, SC 29708
803-504-0971
SC Bar No. 102550
ATTORNEY FOR APPLICANT

Opposing Counsel:
Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
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APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2018-CP-29-0536

David Kucinski, #373636, Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Brittany Clark, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Samuel L. Key
Post-Conviction Relief
6th and 13th Judicial Circuits
P.O. Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

05/28, 2019

Brittany Clark
BRITTANY E. CLARK
PARALEGAL TO ATTORNEY DONAE A. MINOR
1750 SC Highway 160 West,
Ste. 101-259
Fort Mill, SC 29708
803-504-0971

RECEIVED

MAY 31 2019

STATE OF SOUTH CAROLINA)
 COUNTY OF LANCASTER)
)
 David Antonio Kucinski, # 373636,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SIXTH JUDICIAL CIRCUIT

Case No.: 2018-CP-29-0536

ORDER OF DISMISSAL

CLERK OF COURT
 LANCASTER, SC

2019 MAY 16 PM 12: 01

FILED
 CLERK OF COURT

The matter before the Court is an action for post-conviction relief (PCR) commenced by David Kucinski May 8, 2018. In his PCR application, Kucinski alleged ineffective assistance of counsel for failing to move to withdraw his plea.

Donae A. Minor, Esquire, was appointed as Kucinski's PCR counsel. Assistant Attorney General Samuel Key represented the State. Kucinski's PCR hearing was scheduled to be held January 23, 2018, in Lancaster. However, PCR counsel moved for a continuance by email to the Chief Administrative Judge on January 15, 2019, because plea counsel had not yet provided PCR counsel with a copy of his defense file for her review. The State had no objection to PCR counsel's continuance request, and the continuance was granted by email the same day. However, the following day, PCR counsel spoke with Kucinski regarding his case, and he indicated he did not want his hearing continued and insisted his hearing proceed as originally scheduled against PCR counsel's advice. PCR counsel notified the State by email of Kucinski's insistence, and the State replied by stating it would not cancel Kucinski's scheduled transport to court.

On January 23, 2019, PCR counsel and the State placed the above stated events on the record before this Court. PCR counsel reiterated she felt it was in Kucinski's best interest for the hearing to be continued, but Kucinski insisted, against PCR counsel's advice, for the hearing to proceed on the merits. The Court ruled to proceed on the merits.

PMB

During the PCR hearing, Kucinski testified his plea was involuntary and amended his pleadings to allege ineffective assistance of counsel to include the allegation of involuntary guilty plea. The State did not object to the amended pleadings. For the reasons stated below, the Court finds Kucinski's allegations to be without merit and concludes plea counsel was not ineffective. Therefore, the Court denies relief and dismisses this action with prejudice.

I. PROCEDURAL HISTORY

Kucinski is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. Kucinski was indicted at the July 2016 term of the Lansater County Grand Jury for murder (2016-GS-29-1131), armed robbery (2016-GS-29-1132), and two counts of possession of a firearm during the commission of a violent crime. Kucinski was represented by Mark Grier of the Sixth Circuit Public Defender's Office. On August 22, 2017, Kucinski entered an *Alford*¹ plea before Judge Daniel D. Hall to murder, armed robbery, and one of the weapons charges. The plea was entered without sentencing recommendations or negotiations; however, the solicitor agreed to remain silent during sentencing. The plea court accepted Kucinski's *Alford* plea and sentenced him to concurrent terms of imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for possession of a weapon during the commission of a violent crime.

Plea counsel timely filed a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, and *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991), on August 30, 2017. Kucinski filed a *pro se* statement with the court of appeals on September 12, 2017. The court of appeals dismissed the appeal on December 28, 2017 and remitted the case on January 29, 2018. Kucinski commenced this PCR action on May 4, 2018.

II. FACTS

Kucinski was arrested for the armed robbery and murder of Randy Tran. On April 5, 2016, Tran had planned to sell six pounds of high-quality marijuana to Nachon Hayden, Chris Glass, and Tony Maynard. Hayden, Glass, and Maynard arrived in one car. Kucinski and Tran arrived in Tran's car, an orange Scion. (Tr. 13). During the drug deal, Kucinski shot Tran in the back of the head. Tran died. (Tr. 14).

After Kucinski shot Tran—Hayden, Glass, and Maynard fled in the vehicle they arrived in. Two witnesses saw them flee. These witnesses also observed Kucinski stuffing a bloody body into the trunk of an orange Scion. Tran's body was eventually found in a ditch. (Tr. 15).

Kucinski left the scene, driving the Scion, and went to a friend's house. He brought six pounds of high-quality marijuana with him. Kucinski's friend inquired about the Scion, and Kucinski claimed to have purchased it from his "homeboy." Kucinski gave his friend two pounds of the marijuana. (Tr. 15).

Kucinski learned he was wanted in connection to the murder, and eventually called law enforcement and gave up his location. He was arrested in Charlotte, North Carolina. He waived his right to remain silent and gave law enforcement two statements. In his first statement, Kucinski claimed he did not know what happened and that he was not present when Tran was killed. However, when the interviewing officers stated they would look into his alibi, he changed his story. (Tr. 16). In his second statement, Kucinski claimed Glass shot Tran in the back of the head, and then threatened Kucinski. (Tr. 17).

Phone records taken from Kucinski's and Hayden's phones contradict Kucinski's version of events. Sometime before the incident, Kucinski sent two text messages to Hayden (1) asking Hayden

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

for a gun, and (2) stating he wanted to get a gun because he was going to do a "lick." (Tr. 12-13).

Kucinski also sent text messages to other individuals immediately following the incident.

First, Kucinski sent text messages to friends bragging about his new car, saying he had "so much weed," and he wanted to party. (Tr. 17). However, when people informed him that he was suspected of murder, he claimed to have been either in Columbia or Charlotte all day. (Tr. 17). At one point, Kucinski sent a text message stating, "I'm just going to sell the weed and run, see you in five years." (Tr. 17). However, as mentioned above, he eventually turned himself in. Kucinski and his co-defendants were all charged under the "hand of one, hand of all" theory of accomplice liability.

The case was called for trial on August 22, 2017. A jury was empaneled and ready to be selected, but Kucinski informed the State that he wished to plead pursuant to *North Carolina v. Alford, supra*, to murder, armed robbery, and one of the weapons charges. The plea was entered without recommendations or negotiations; however, there was an agreement for the assistant solicitor and Solicitor to remain silent during the sentencing phase of the hearing. (Tr. 3).

The plea court asked Kucinski whether he wished to plead pursuant to *Alford*. Kucinski responded affirmatively. (Tr. 5). The plea court advised Kucinski of the charges against him and the maximum and any mandatory minimum sentences for each charge. Kucinski affirmed he understood the charges against him and the sentencing exposure he faced. (Tr. 5-7). The plea court then advised Kucinski of the meaning and consequences of entering an *Alford* plea. (Tr. 7-8). Kucinski affirmed he understood the nature and consequences of his plea. (Tr. 8, 9). The plea court asked:

Q: And so how do you plead to all three of these charges?

A: From what I've talked with [] [plea counsel] and what we're facing here with the State's evidence versus the truth that I've spoken, it seems in my best interest to plead guilty for the following three crimes, not saying that, one, I shot Randy Tran or had anything to do with the robbery. But based off of the State's evidence that could

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compel a jury to say yes, [I] [am] guilty and prosecute me in *the possibility of it being the life sentence that pushes me to come before the [plea court] and beg for mercy* on a plea in regards to saying that I'm guilty.

Q: All right. And so is it your desire to enter this plea under a[n] [Alford] plea?

A: Yes, Your Honor.

(Tr. 8-9) (emphasis added).

The plea court asked Kucinski whether he was entering the plea freely, voluntarily and knowingly. (Tr. 9, 11). Kucinski affirmed. (Tr. 9, 11). The plea court found Kucinski's decision to enter the plea to be "freely, voluntarily, and intelligently made . . ." (Tr. 11-12). The plea court then advised Kucinski:

[Y]ou have ten days from today's date in which to appeal, if I make an[] error, if you disagree with the sentence you have a right to an appeal, however, you have to file that appeal within ten days. You normally start that process by notifying your attorney of your desire to appeal, do you understand that right?

Kucinski affirmed he understood. (Tr. 12). The factual basis for the charges were then placed on the record. (Tr. 12-17).

After hearing the State's version of the facts, Kucinski reaffirmed that he wished to plead pursuant to *Alford*. (Tr. 18). The plea court sentenced Kucinski to concurrent terms of imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for possession of a weapon during the commission of a violent crime.

On August 30, 2017, plea counsel timely submitted a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, citing *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991). Kucinski filed a *pro se* statement with the court of appeals on September 12, 2017. The court of appeals dismissed the appeal on December 28, 2017, and remitted the case on January 29, 2018. Kucinski commenced this PCR action on May 4, 2018.

III. ISSUES

Kucinski alleges he is being held in custody due to ineffective assistance of counsel.

Kucinski's allegations of ineffective assistance of counsel are:

1. Plea counsel's failure to move to withdraw Kucinski's plea; and
2. Kucinski unknowingly and involuntarily pleaded guilty.²

IV. DISCUSSION

The central issue before the Court is whether Kucinski's plea was the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

Kucinski alleges plea counsel was ineffective for two reasons: (1) for failure to move to withdraw Kucinski's plea; and (2) Kucinski involuntarily pleaded guilty. For the reasons stated below, the Court finds plea counsel was neither deficient in his representation, nor was Kucinski prejudiced by the alleged deficiencies. Further, the Court finds Kucinski knowingly and voluntarily entered his plea; therefore, the Court denies relief and dismisses the action with prejudice.

1. Failure to move to withdraw Kucinski's plea

In his PCR application, Kucinski alleged the plea court advised that he had ten days to withdraw his guilty plea. The Court interprets this allegation as ineffective assistance of counsel for failure to move to withdraw Kucinski's guilty plea. The Court finds this allegation is without merit.

Paul

In a PCR action, the applicant bears the burden of proving his allegations. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)

At his PCR hearing, Kucinski waived this allegation from the witness stand. Kucinski explained, at the time he pleaded, he thought the plea court advised him he had ten days to withdraw his plea. However, Kucinski testified that after review of the transcript from his plea hearing, the plea court advised he had ten days to appeal, not withdraw, his plea. Kucinski is correct, the plea court advised him he had ten days to appeal his plea. (Tr. 12). Based upon Kucinski's testimony at the PCR hearing which is supported by the plea transcript, the Court finds Kucinski has failed to meet his burden of proof in regard to this allegation. See *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (stating the applicant bears the burden of proving his allegations). Therefore, the Court denies relief on this issue and dismisses the allegation with prejudice.

2. Involuntary Guilty Plea

The Court now turns to the issue that arose during Kucinski's PCR hearing: whether Kucinski received ineffective assistance of counsel rendering his plea unknowing and involuntary. For the reasons discussed below, the Court finds Kucinski pleaded with the advice of plea counsel; therefore, the issue before the Court is whether his plea was knowingly and voluntarily entered. See *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (stating a defendant who entered a plea on the advice of counsel may only attack the voluntary and intelligent nature of the plea).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum

² Kucinski's second allegation arose during his testimony at the PCR hearing; however, the State did not object to the testimony and cross-examined Kucinski and plea counsel on the issue.

Paul

penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Kucinski attacked the voluntary nature of his plea through his testimony at the PCR hearing. Specifically, Kucinski alleged he was coerced into pleading guilty by one of his co-defendants and by plea counsel. Kucinski claimed his co-defendant threatened Kucinski and his sister in exchange for the plea. Kucinski further alleged his co-defendant threatened plea counsel, and plea counsel forced Kucinski to plead because of the alleged threats. The Court finds these allegations are without merit.

The Court finds Kucinski's testimony regarding threats made by his co-defendant towards Kucinski, his sister, and plea counsel not credible. The plea court specifically questioned Kucinski regarding the voluntariness of his plea during the plea hearing, and at no time during the plea court's colloquy did Kucinski indicate he was pleading involuntarily. Additionally, plea counsel credibly testified Kucinski never mentioned any threats made towards him or his sister while he represented Kucinski. Further, plea counsel credibly testified he was never threatened by anyone involved in Kucinski's case, and no threats were made towards him that affected his representation of Kucinski.

Finally, plea counsel testified as to Kucinski's history of mental competency. Plea counsel recalled one point early in his representation when Kucinski was not competent, so plea counsel had Kucinski evaluated. However, plea counsel stated Kucinski's competency was restored well before he pleaded guilty. Plea counsel was able to discuss the facts and evidence of the case with Kucinski, and Kucinski seemed to fully understand the meaning and consequences surrounding his case. Plea counsel stated he advised Kucinski of the nature of the charges against him, the maximum and any mandatory minimum penalties he faced, and the nature of the constitutional rights he waived in pleading guilty. Plea counsel testified Kucinski seemed fully aware of everything going on the day

of the plea. The Court finds credible plea counsel's testimony that Kucinski's competency was fully restored well in advance of his plea. Therefore, the Court finds Kucinski knowingly and voluntarily pleaded guilty.

At the end of the PCR hearing, Kucinski, through PCR counsel, moved to have himself evaluated based upon his behavior the day of the PCR hearing. The Court denied Kucinski's motion based upon its observation of Kucinski during the PCR hearing. The Court listened to and observed Kucinski carefully during the PCR hearing and finds Kucinski was competent and understood exactly what transpired during the hearing. While the Court does not find Kucinski's PCR hearing testimony credible, he displayed rational thought and behavior throughout the hearing.

Based upon the foregoing analysis, the Court finds Kucinski knowingly and voluntarily entered his plea. The Court is not swayed by Kucinski's testimony that he and his sister were threatened by his co-defendant, and therefore denies relief on the issue. Further, plea counsel credibly testified he was never threatened nor did he force Kucinski to plead, and Kucinski's competency was restored in advance of the plea hearing. The Court makes these determinations based on the testimony given at the PCR hearing and the record before the Court. Accordingly, the Court denies relief and dismisses this allegation with prejudice.

V. CONCLUSION

The Court finds plea counsel's representation was neither deficient nor prejudicial. Kucinski pleaded guilty pursuant to the advice of plea counsel. Kucinski knew the meaning and consequences of pleading guilty to the charges, and voluntarily chose to plead. Kucinski failed to show plea counsel was deficient for failing to move to withdraw his plea and failed to show any prejudice resulting from such alleged deficiency. Finally, the Court finds Kucinski was competent during his PCR hearing.

AMB

The Court notes Kucinski must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Kucinski has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRPC, provides that if Kucinski wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Kucinski's behalf. Kucinski is directed to Rule 243, SCACR, for appropriate procedures for appeal.

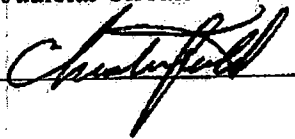
THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Kucinski shall be remanded to the custody of the State.

AND IT IS SO ORDERED.



PAUL M. BURCH
Presiding Judge
Sixth Judicial Circuit



 South Carolina

May 13th, 2019.

