STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable D. Craig Brown, Circuit Court Judge

CLIFTON COOKE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000316

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the PCR court erred in denying relief, where plea counsel was ineffective for failing to move to withdraw Petitioner's plea after the assistant solicitor divulged in chambers, minutes before Petitioner's guilty plea, that a co-defendant who implicated Petitioner and cooperated with law enforcement was not going to testify against him, where counsel instead filed a motion to reconsider the sentence, and where Petitioner would have gone to trial if the co-defendant was not going to be testifying against him?

II. Whether the PCR court erred in denying relief, where plea counsel failed to request a continuance after learning in chambers that Petitioner's co-defendant was not going to testify against him, mere moments before Petitioner's plea began, where Petitioner could have been successful at trial had the co-defendant not testified against him, where good cause existed to grant a continuance, and where Petitioner was denied time to make a life-changing decision?

STATEMENT

Petitioner was indicted by a Kershaw County grand jury for the offense of murder on April 26, 2006. App. 113 – 114. He was tried in 2007, found guilty, and sentenced to forty years' imprisonment. App. 37. Joshua Kendrick represented him at that trial before the Honorable James. R. Barber, III. Id. On February 29, 2012, the Honorable J. Ernest Kinard, Jr. granted Petitioner's first application for post-conviction relief.

The murder conviction was vacated, and Petitioner pleaded under North Carolina v. Alford[1] to voluntary manslaughter on March 6, 2014 before the Honorable R. Ferrell Cothran, Jr. App. 1. Jason Kirincich represented him, and Curtis Hutchinson served as the assistant solicitor. The plea was made without recommendation or negotiation. App. 3 ll. 14 – 17. The facts as alleged by the state were as follows:

On January 5, 2002, Troy Keitt was shot outside his mother's house. App. 6 l. 13 – App. 9 l. 8. No members of Keitt's family witnessed the shooting; when gunshots were heard, family members scrambled outside and observed "two individuals running" towards a car, and Keitt was on the ground clutching himself. Id. According to the assistant solicitor, three family members heard Keitt say, before he passed, that "[i]t was Clifton and Weasel" who shot him." Id.

Weasel was the nickname of Talmadge Dixon, a man who lied to the police about his presence at the shooting. App. 8 ll. 3 – 5. His falsehood notwithstanding, Dixon claimed that Petitioner rode with him and another man (nicknamed Wess or West) in a Honda over to Keitt's mother's home on the day in question. App. 8 ll. 6 – 20. Contrary to witness statements which suggested that two individuals ran to the car after the shooting, Dixon contended that Petitioner

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[1] 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

went by himself to the doorstep and spoke with Keitt before shooting him. Id. Dixon testified at Petitioner's first trial, much to Petitioner's detriment. App. 54 ll. 2 – 6.

The ground for granting post-conviction relief for Petitioner's first trial revolved around another witness, Gloria Moore, who offered a different recollection of the facts. App. 9 ll. 1 – 8. The state had knowledge of exculpatory evidence regarding Moore's testimony. App. 14 l. 9 – App. 14 l. 9 – App. 21 l. 10. Moore was the Keitt's across-the-street neighbor. Id. During Petitioner's first PCR, PCR counsel Jeremy Thompson hired investigator Dave McDougall who spoke with Moore. Id. Moore advised McDougall that she had previously spoken with investigators from the sheriff's office. Id. She had told them that she went over to the decedent after she heard gunshots, and at that point she heard him say "Weasel shot me." Id. She did not hear anything about Petitioner. Id. She wrote a statement in front of four investigators. Id.

A police officer named Rob Evans took notes and created an incident report after arriving on scene. The report included a statement from the decedent's wife, Althea Keitt. She stated the decedent told her "Subject Number 1" shot him. Id. According to the incident report created by Evans, Subject Number 1 was Talmadge Dixon. Id. As mentioned above, Dixon lied to investigators before working out a deal wherein he testified at Petitioner's trial and received a sentence of time served on an accessory after the fact charge. Id.

Judge Cothran found there was a factual basis for the plea, accepted the plea and sentenced Petitioner to twenty years' imprisonment. App. 10 l. 23 – App. 11 l. 2; App. 24 ll. 4 – 7. During mitigation, plea counsel articulated that both he and Petitioner wanted to take the case to trial. App. 19 ll. 18 – 23. Unfortunately, both Deputy Evans and private investigator McDougall passed away prior to the plea. App. 20 ll. 5 – 15.

Notably, when given an opportunity to address the plea court, Petitioner maintained his innocence:

> I want to tell the family that I'm sorry, but I did not shoot Troy Keitt. The only reason why I'm pleading guilty to this is because I fear for my life. I feel like I ain't got a chance of winning.
>
> So that's why I'm going to go ahead and plead guilty. But Talmadge Dixon shot Troy Keitt. And I'm sorry to the Keitt family.

App. 21 ll. 14 – 24. The main reason Petitioner doubted his chances at trial was the testimony of Dixon. This fact was brought up by plea counsel after Petitioner's plea was accepted but before he was sentenced:

> For one thing, I want to put out there for Your Honor to consider and have on the record, we were just told minutes before this plea that Mr. Talmadge Dixon has refused to cooperate with law enforcement further, which, again it is unfortunate that his case was handled the way it was, but it puts both the State and the Defense in a very bad position going forward. And that is why Mr. Cooke, as he indicated, doesn't feel like he has a great shot at trial. He already knows what happened one time.

App. 23 ll. 10 – 23. Based on the possibility that Dixon could change his mind and cooperate at any point prior to Petitioner's potential trial, Petitioner proceeded with the plea. Although plea counsel requested a sentence of no more than fifteen years, the plea judge gave him twenty years. App. 24 ll. 4 – 7.

Plea counsel filed a Motion to Reconsider the sentence on March 14, 2014. App. 26. Following an *in camera* hearing, an Order Denying the Motion to Reconsider was issued on May 20, 2014. App. 27. The plea judge found that although Petitioner was advised that Dixon was not going to testify against him "only minutes before the plea," the state's untimely disclosure did not prevent Petitioner from taking "any number of actions based on the disclosure." Id.

Petitioner then filed a second application for post-conviction relief, on August 24, 2015. App. 28 – 34. It contained allegations of ineffective assistance of counsel, including failure to

investigate, failure to withdraw guilty plea, and involuntary guilty plea. App. 30. The state made its Return on or about November 9, 2015. App. 37 – 43.

Through counsel, Petitioner filed an amended application for post-conviction relief on or about June 17, 2016. App. 35 – 36. The amendments added failure to investigate witnesses, failure to inform Petitioner regarding witness (un)availability, failure to request a continuance, failure to inform Petitioner regarding the full consequences of his plea, and failure to file a motion to withdraw the guilty plea. Id.

An evidentiary hearing was convened on July 14, 2016 before the Honorable D. Craig Brown. App. 44. Kristy Goldberg represented Petitioner, and Jessica Kinard appeared on behalf of the state. Petitioner and plea counsel Kirincich testified at the hearing. The PCR court denied relief at the conclusion of the hearing and requested that counsel for the state prepare an order to that effect. App. 84 l. 25 – App. 85 l. 23.

This petition follows.

ARGUMENT

I. The PCR court erred in denying relief, where plea counsel was ineffective for failing to move to withdraw Petitioner's plea after the assistant solicitor divulged in chambers, minutes before Petitioner's guilty plea, that a co-defendant who implicated Petitioner and cooperated with law enforcement was not going to testify against him, where counsel instead filed a motion to reconsider the sentence, and where Petitioner would have gone to trial if the co-defendant was not going to be testifying against him.

Relevant facts

Petitioner was arrested on September 21, 2004. App. 48 l. 24 – App. 49 l. 1. At the time of his evidentiary hearing, Petitioner had been continuously incarcerated since that date. App. 49 ll. 2 – 4. Following his first successful post-conviction relief action, he was transferred to the county jail while awaiting trial. App. 50 ll. 6 – 24. Plea counsel Kirincich represented Petitioner from the time he was sent back to the jail until his plea. Id. However, counsel did not assist with trial preparation. App. 50 ll. 19 – 20. He likewise failed to investigate Petitioner's case fully. App. 50 ll. 21 – 24. When Petitioner went to court to plead, he believed he was going to receive a fifteen year sentence. App. 51 ll. 8 – 23. This understanding was based upon conversations with plea counsel. Id.

From "day one" he requested that plea counsel investigate Dixon. App. 53 ll. 12 – 24. He had asked that plea counsel determine whether Dixon was going to testify against him. App. 53 l. 12 – App. 54 l. 1. However, plea counsel never contacted Dixon to figure out whether he was going to testify against Petitioner at the second trial. App. 54 ll. 7 – 14.

Had Petitioner known Dixon was not going to testify against him, he would have gone to trial. App. 54 l. 18 – App. 55 l. 5. Had Dixon not testified against him, Petitioner believed he would have been found not guilty at trial. Id. Only minutes before sentencing at his guilty plea, Petitioner learned that Dixon was not cooperating with the state and therefore was not going to testify. App. 55 ll. 3 – 21. Plea counsel never advised Petitioner of this development. App. 55 l. 24 – App. 56 l. 1. Had Petitioner decided not to plead guilty after learning about Dixon's lack of cooperation, he was unsure whether his trial would have begun the same day. App. 56 ll. 10 – 13.

After the plea, Petitioner requested that counsel move to withdraw it. App. 56 ll. 19 – 21. Instead, counsel filed a motion to reconsider. App. 56 ll. 22 – 23. Petitioner was not allowed to participate in the motion to reconsider hearing. App. 57 ll. 11 – 19. Following the denial of that motion, plea counsel never filed a motion to withdraw the plea. App. 57 ll. 20 – 21.

On cross-examination at his evidentiary hearing, Petitioner indicated that his decision to plead rather than go to trial stemmed solely from the fact that Dixon was going to testify against him. App. 60 ll. 21 – 24. Plea counsel advised Petitioner that if he went to trial, Dixon was going to testify against him and Petitioner would likely receive a life sentence. Id.

Plea counsel was contacted by the solicitor's office prior to Petitioner's plea. App. 65 l. 24 – App. 66 l. 24. He was told that Dixon had charges pending against him in Richland County which resulted in his decision to testify against Petitioner. Id. On the day of Petitioner's plea, however, plea counsel was told in an in-chambers meeting with the plea judge, *after Petitioner had already signed his plea paperwork*, that Dixon was not going to be testifying against Petitioner. Id. After the attorneys left the plea judge's office, plea counsel claims to have told Petitioner that Dixon "was not going to be testifying or had, at least, indicated to the State

recently that he would not testify." Id. But, as counsel noted, "we still went forward with the plea." Id. Counsel characterized the conversation regarding Dixon's change of heart as occurring "mere moments before" Petitioner's plea began. App. 66 l. 25 – App. 67 l. 3.

Counsel failed to advise Petitioner that he could take some time and think about the major revelation before deciding whether to continue with the plea. App. 75 l. 23 – App. 76 l. 6. He never suggested to Petitioner that they request a continuance. App. 76 ll. 7 – 10.

Counsel testified that Petitioner's family was notified regarding the hearing on the motion to reconsider the sentence. App. 68 ll. 8 – 23. However, both the family members as well as Petitioner were unable to participate in or even witness the discussion held in chambers. Plea counsel could not recall what was said at the in camera hearing and in fact did not remember that it occurred until he was reminded at the evidentiary hearing. App. 78 ll. 8 – 20.

On cross-examination, plea counsel admitted that the order denying the motion to reconsider the sentence was based on the fact that Petitioner had time, albeit minutes, to decide whether he wanted to proceed with the plea. App. 78 l. 24 – App. 79 l. 13. Plea counsel likewise agreed that "[w]henever Mr. Cooke received that information ... doesn't have anything to do with what sentence he received." Id. In fact, "[i]t had everything to do with whether or not Mr. Cooke made an informed decision to have a plea or have a trial." Id. When pressed as to why he did not file a motion to withdraw the plea, counsel did not have an answer. App. 79 ll. 12 – 13.

Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a PCR applicant must show: (1)

counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To show deficient performance, an applicant must prove "counsel's representation [fell] below an objective standard of reasonableness." Id. at 688. To demonstrate prejudice, an applicant must show "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Smith v. State, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (quoting Strickland, 466 U.S. at 694).

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). The PCR court should also evaluate "the strength of the State's case in light of all the evidence presented to the jury." Id. Generally, "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his

burden of proving prejudice." Id. However, "the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." Id. at 189, 810 S.E.2d at 844.

As noted by PCR counsel, this situation is similar to Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) wherein Rolen exclaimed that he had not murdered anyone. His counsel did not move to withdraw the plea, and Rolen was sentenced to twenty-five years. 384 S.C. at 412, 683 S.E.2d at 473. Rolen testified that he pled guilty because he would likely be found guilty. Id. This Court reversed, holding that Rolen received deficient performance and was prejudiced.

Similarly, in the matter at hand plea counsel was deficient in failing to move to withdraw Petitioner's guilty plea. Petitioner requested a jury trial and in fact had already undergone one. He only decided to plead guilty after counsel advised him that Dixon would testify against him, he would be convicted, and he would receive a life sentence. Petitioner repeatedly asserted his innocence.

Plea counsel agreed there were no eyewitnesses to the shooting. App. 73 ll. 6 – 8. The most damaging piece of evidence was a dying declaration. App. 73 ll. 10 – 12. As to the declaration, there was a dispute as to what was actually said. App. 73 ll. 17 – 19. Neither plea counsel nor his investigators made contact with Dixon. App. 74 ll. 15 – 20. With an amorphous threat of Dixon's testimony looming, Petitioner felt like he had no choice but to plead guilty. However, when that danger was temporarily removed, Petitioner was not left with enough time to decide. He was not afforded five minutes to make a decision that will impact at least the next twenty years of his life.

Counsel could have filed a motion to withdraw the guilty plea. At the very least, a hearing could have been held, and Petitioner could have received relief at the circuit court. Had the motion failed, it could have been the subject of a direct appeal. Due to counsel's failure to

make such a motion, the plea judge was unable to exercise any discretion. The motion to reconsider the sentence was the improper motion to achieve Petitioner's desires.

Petitioner was told that Dixon was going to testify against him. He and counsel operated under that belief for the majority of the representation. Their strategies were based upon that understanding. Then they were told, mere moments before Petitioner's plea, that Dixon would not testify against him. The conduct of plea counsel in not protecting Petitioner fell below prevailing professional norms. The failure to file a motion to withdraw constituted ineffective assistance of counsel, and it was prejudicial to Petitioner; the plea judge was unable to use discretion, because counsel did not file the motion.

II. The PCR court erred in denying relief, where plea counsel failed to request a continuance after learning in chambers that Petitioner's co-defendant was not going to testify against him, mere moments before Petitioner's plea began, where Petitioner could have been successful at trial had the co-defendant not testified against him, where good cause existed to grant a continuance, and where Petitioner was denied time to make a life-changing decision.

After learning that Dixon was not going to testify against him, Petitioner had a choice. He could proceed with his plea without recommendation or negotiation on the charge of voluntary manslaughter and face a sentence of between two and thirty years. S.C. Code Ann. § 16-3-50. Alternatively, as he wanted to do, he could proceed to trial and note to a finder of fact all of the inconsistencies in the state's case. This monumental decision traditionally transpires over a lengthy timespan when defendants mull over the benefits and drawbacks of either decision. Petitioner had mere moments to do so. Counsel could have, and should have, requested a continuance to allow Petitioner additional time to make this decision.

The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7(c), SCRCrimP. A similar provision exists in the civil context. Rule 40(i), SCRCP. As such, "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

"It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," the decision must rest upon, "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 850 (1964).

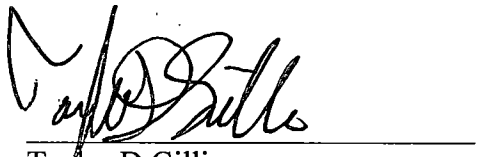
As articulated by PCR counsel, plea counsel should have allowed Petitioner "the ability to process and think about that major change in his case." App. 81 ll. 11 – 12. Petitioner was unsure whether the offer of voluntary manslaughter would remain an option if he decided not to plead guilty that day. Furthermore, he was unaware of whether the state would try to take him to trial that day; neither he nor counsel were prepared. Petitioner was not in a position to make such an important decision on the day of his plea when he learned that Dixon was not going to testify against him. Plea counsel should have requested a continuance in order to allow Petitioner a reasonable amount of time to consider his choices. Moreover, Petitioner could have

used the additional time to speak with plea counsel about his options. The duo could have explored the possibility of going to trial or explored ways to prevent Dixon from testifying against him.

Petitioner had already been tried once. Had he realized that he could have proceeded to trial without the danger of Dixon's damaging testimony, he likely would have chosen that route. His prior PCR counsel had exposed weaknesses in the state's use of the dying declaration through the discovery of the neighbor's statement. Coupled with Petitioner's repeated claims of innocence, counsel should have moved for a continuance in order to allow Petitioner time to make an informed decision. The failure to do so constituted a deficiency, and Petitioner was prejudiced by the fact that he pleaded guilty and received a twenty year sentence. Alternatively, had he been granted a continuance, he could have proceeded to trial and possibly been successful in obtaining a favorable verdict.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issues raised herein.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable D. Craig Brown, Circuit Court Judge

CLIFTON COOKE,

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V.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Clifton Cooke, #320091, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 16th day of August, 2019.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 16th day of August, 2019.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027