STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
DeAndrea G. Benjamin, Plea Judge
Clifton Newman, PCR Judge

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S.C. SUPREME COURT

Appellate Case No. 2019-001044

John W. Madden,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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Issues Presented on Certiorari

Petitioner's Issues Presented

I. Did the PCR court err in finding that Petitioner failed to meet his burden to establish ineffective assistance of counsel prior to and leading up to his guilty plea?

II. Did the PCR court err in finding that Petitioner's guilty plea was entered into knowingly and voluntarily?

Respondent's Counter-statement of Issues Presented

I. Did the PCR court correctly find Counsel considered an involuntary intoxication defense strategy, informed Petitioner of this strategy, and advised Petitioner the strategy would unlikely be successful at trial because Petitioner was consuming alcohol the night of the incident and remembered putting a gun to the victim's head in concluding Petitioner knowingly and voluntarily pleaded guilty?

Statement of the Case

Petitioner was indicted for attempted murder in July 2012. (App. 23-24). Petitioner was represented by Stanley L. Myers, Sr. (Counsel), of the Moore Taylor Law Firm, P.A. Assistant Solicitor Kathryn "Luck" Campbell prosecuted the case. On September 18, 2013, Petitioner pleaded guilty to attempted murder before Judge DeAndrea G. Benjamin. (App. 16; 255-99). Simultaneously, Petitioner waived presentment and pleaded guilty to criminal domestic violence (CDV), first offense. (App. 17-19; 258). Petitioner pleaded guilty with no recommendations or negotiations—straight up. The plea court accepted Petitioner's guilty plea; however, it retained jurisdiction and deferred sentencing to weigh the victim's statements and mitigation presented. (App. 16-17).

On October 24, 2014, Petitioner's sentencing hearing convened. (App. 16-17; 301-16). At the sentencing hearing, the State informed the plea court it and Petitioner had agreed on a negotiated sentencing range of ten-to-twenty years' imprisonment for attempted murder. (App. 303). Thereafter, the plea court sentenced Petitioner to concurrent terms of thirty days for CDV and fourteen years for attempted murder. (App. 16-17). Petitioner did not appeal.

Petitioner timely commenced the underlying PCR action on October 15, 2015. (App. 36-41). Petitioner only challenged his attempted murder conviction. The State submitted its return on March 28, 2016. (App. 30-33). Petitioner subsequently amended his allegations on January 24, 2017. (App. 42-45). A hearing into the matter convened before Judge Clifton Newman on December 11, 2017. (App. 65-236). Petitioner was represented by James R. Snell and Vicki D. Koutsogiannis of the Law Office of James R. Snell, Jr., LLC. Assistant Attorney General Jessica E. Kinard represented the State.

Petitioner, Dr. Thomas Martin, and Dr. Edwin Watson testified on Petitioner's behalf. Dr. Martin was qualified as an expert in forensic psychiatry, and Dr. Watson was qualified as an expert in clinical psychology. (App. 74; 95). Counsel and private-investigator Steven Smith testified for the State. At the end of the PCR hearing, the PCR court orally denied relief and specifically found Petitioner, and his experts, not credible. (App. 234-36). The PCR court issued an order to that effect on December 12, 2018. (App. 1-14). Petitioner moved for reconsideration.

On December 28, 2018, Petitioner moved for reconsideration pursuant to Rule 59(e), SCRCP. (App. 46-48). The State made its return to the 59(e) motion on May 8, 2019. A hearing on the motion to reconsider convened on May 8, 2019, before the PCR court. (App. 238-53). Petitioner was present and represented by James Snell. Assistant Attorney General Samuel L. Key represented the State. After arguments, the PCR court requested proposed orders. The PCR court denied the motion on May 29, 2019. (App. 57-64). Petitioner appealed.

Statement of the Facts

During the late night/early morning of December 14–15, 2011, Petitioner attempted to kill Megan Madden, his wife, at their home. (App. 263-64).

Petitioner was formerly a pilot in the National Guard and an Agent with the Department of Natural Resources (DNR). However, in April 2003, while Petitioner was working for DNR, a plane he was flying crashed. Petitioner suffered severe physical injuries as a result. (App. 279). Additionally, Petitioner was diagnosed with post-dramatic stress disorder (PTSD) due to the plane crash and developed an addiction to the pain medication he was prescribed during his recovery. (App. 262-63; 283-85).

On December 14, 2011, Petitioner slept most of the day. Megan and her daughter were in the house most of the day then went to dinner, leaving Petitioner at home alone. (App. 263). After

dinner, Megan's daughter went to a friend's house to spend the night, and Megan returned home. Once home, Megan went to sleep. (App. 263).

Megan awoke to Petitioner on top of her holding a gun to her head. (App. 263). Petitioner then placed the gun in Megan's mouth and told her he intended to kill her, then himself. (App. 263). A struggle ensued. (App. 263). Megan got away from Petitioner, but Petitioner shot her in the head. The bullet penetrated her scalp but did not penetrate her skull. She survived. (App. 263-64). Miraculously, Megan escaped the home. (App. 264). During her escape, Petitioner shot at her twenty-seven times. (App. 264). Petitioner was arrested that night. (App. 265).

Counsel had Petitioner evaluated for competency and ability to conform by Dr. Donna Maddox.[1] (App. 283) Dr. Maddox informed the plea court that at the time of the incident, Petitioner suffered from PTSD and was abusing opiates combined with alcohol. (App. 284-85). Petitioner was also being treated for low-testosterone, which was unrelated to the plane crash. (App. 285). However, Dr. Maddox conveyed to the plea court her opinion that Petitioner was competent and able to conform his conduct to the requirements of the law. (App. 286).

[1] At the time of the plea hearing, Dr. Maddox was known as Dr. Schwartz-Watts.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate court's give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

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).

"In assessing prejudice under *Strickland*, the question ***is not*** whether a court can be certain counsel's performance had no effect on the outcome . . . ." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. In the context of a guilty plea, 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).

ARGUMENT

The PCR court correctly found Counsel considered an involuntary intoxication defense strategy, informed Petitioner of this strategy, and advised Petitioner the strategy would unlikely be successful at trial because Petitioner was consuming alcohol the night of the incident and remembered putting a gun to the victim's head in concluding Petitioner knowingly and voluntarily pleaded guilty

Petitioner asserts PCR counsel was ineffective for failing to investigate and advise him of an involuntary intoxication defense due to Petitioner's Ambien use. Specifically, Petitioner asserts, "There was conflicting testimony at the various PCR hearings as to whether [Petitioner's] counsel investigated an Ambien defense." (Pet. 4). Petitioner's argument fails because the PCR court found Counsel investigated and advised Petitioner about the success probability of the involuntary intoxication defense. The PCR court's ruling was based on credibility findings which are supported by the record. Therefore, certiorari should be denied.

The PCR court found credible Counsel's testimony "he did investigate [the possibility of using Petitioner's Ambien usage as a defense at trial], going so far as to forward the information to Dr. Maddox in order for her to evaluate [Petitioner's] mental health." (App. 11). The PCR court further found Petitioner's testimony on this issue not credible. (App. 11). These findings are supported by the record.

Counsel testified he wrote Dr. Maddox a letter on May 24, 2012, advising her that Petitioner is permanently disabled and "treats with pain medications and sleep aids, which includes Ambien." (App. 169). Counsel testified one of the biggest problems with the Ambien defense theory was that "Petitioner indicated to [Counsel] that he and his ex-wife had gone to some sort of Christmas party, that they may have been drinking . . . ." and "there was never any sort of denial that he squeezed the trigger on this incident." (App. 169). Further, Counsel testified, "[Petitioner] told me he put a gun to her head. And all of the stuff regarding pain medications and Ambien, we

put all of that in the mitigation, we discussed it." (App. 170). When asked about Petitioner's testimony at the PCR hearing—that he does not remember anything about the night of the incident—Counsel responded, "I hear that now, which was not the case when . . . I met with him." (App. 171).

At the guilty plea hearing, Petitioner stated, under oath, he agreed with the State's version of the facts. (App. 266). Petitioner never asserted the facts presented by the State were inaccurate, and, according to Counsel, Petitioner informed Counsel he remembered drinking that night and he remembered holding a gun to Megan's head. It was not until PCR Petitioner claimed he had no recollection of the incident. This evidence in the record supports the PCR court's finding Petitioner lacked credibility.

It is clear from the record that Counsel was aware of, investigated, and advised Petitioner of the potential Ambien defense. Counsel's assessment of the defense was reasonable because Petitioner informed Counsel he was also drinking the night of the incident. Petitioner's argument Counsel failed to investigate and advise him of the Ambien defense fails because the PCR court simply did not believe Petitioner and believed Counsel. Therefore, certiorari should be denied based on this Court's standard of review of credibility findings. *See Foye*, 335 S.C. at 589, 518 S.E.2d at 267 (explaining appellate court's give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses).

Petitioner argues his guilty plea was unknowing and involuntary because he was not properly advised of his rights by Counsel. Petitioner asserts he pleaded guilty because he relied on the advice of Counsel and believed he had no other legal theory of defense available to him. However, Petitioner never disputed the facts presented at the plea hearing until after sentencing. In fact, Petitioner informed Counsel he was drinking that night and remembered putting the gun

to Megan's head. Even so, Counsel had Petitioner evaluated by Dr. Maddox to explore the possibility of defense theories. Counsel informed Dr. Maddox of Petitioner's Ambien usage, and taking all the circumstances into consideration, Dr. Maddox found Petitioner competent and able to conform. Counsel reasonably advised Petitioner of the likelihood of success at trial, and Petitioner chose to plead guilty. Clearly, Petitioner did not like the sentence he received. However, the sentence Petitioner actually received has nothing to do with his decision to plead guilty; therefore, certiorari should be denied.

CONCLUSION

For the reasons stated above, this Court should deny certiorari because Counsel was not constitutionally ineffective. Petitioner took into consideration the likelihood of his success at trial and chose to plead guilty. As such, certiorari should be denied. The State would ask this Court for the opportunity to more fully brief this issue if certiorari is granted.

Respectfully submitted,

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BY:
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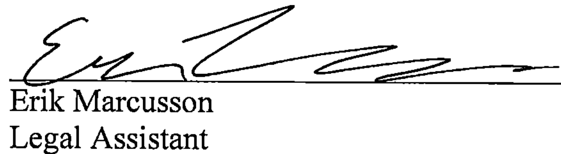
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Mr. James Ross Snell, Jr.
Law Office of James R. Snell, Jr., LLC
123 Harmon Street
Lexington, SC 29072

This 13th day of March, 2020.



Erik Marcusson
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 13 2020
S.C. SUPREME COURT

March 13, 2020

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

RE: **<u>John W. Madden v. State of South Carolina</u>**
Appellate Case No.: 2019-001044

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Samuel L. Key
Assistant Attorney General
S.C. Bar # 103206

SK/em
Enclosures

cc: James R. Snell, Jr. Esquire
Victim Advocacy Division