STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Post-Conviction Relief Judge
Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2019-000963

PATRICK FEREBEE #370050, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Whether Petitioner entered his guilty plea involuntarily because he pled guilty under the impression that the solicitor would stand silent during sentencing, where the solicitor instead said the complaining witness requested that Petitioner be sentenced "closer to the maximum," since Petitioner would not have pled guilty and would have gone to trial had he known that the solicitor was going to make that sentencing request on behalf of the complaining witness?

Respondent's Counterstatement of Issue on Certiorari

Did Petitioner improperly raise the issue of counsel's failure to advise Petitioner that the solicitor was going to make a sentencing request on behalf of the complaining witness for the first time on appeal, where the sole issue concerning plea counsel before the lower court was counsel's alleged failure to object to the solicitor's statement?

Did the post-conviction relief court properly find Petitioner failed to establish counsel was constitutionally ineffective for failing to advise Petitioner the solicitor would be publishing the victim's request for a sentence "closer to the maximum" where counsel testified he would have advised Petitioner of the victim's request and there was no agreement that the State remain silent during sentencing?

STATEMENT OF THE CASE

During the April 2015 term, the Charleston County Grand Jury indicted Petitioner for attempted murder and arson in the first degree. App. 116-119.

On October 12, 2016, before the Honorable Kristi L. Harrington, Petitioner pled guilty to Assault and Battery of a High and Aggravated Nature and Third-Degree Arson. Petitioner was represented by John Kozelski, esquire. Burns Malone Wetmore, esquire, prosecuted the case. Judge Harrington found Petitioner's guilty plea was freely, knowingly, and voluntarily made. Judge Harrington sentenced Petitioner to confinement for a period of twelve years. App. 23, ll. 15-18. Petitioner was given six hundred and sixty-eight days credit for time served. Petitioner was also ordered to receive a mental health evaluation, follow all recommendations, and be referred to the Alcohol Treatment Unit. The Court ordered no contact with the victim. Petitioner did not appeal his guilty plea.

On October 10, 2017, Petitioner filed an application for Post-Conviction Relief (PCR). Petitioner alleged the following in his application:

1. Ineffective Assistance of Counsel
    a. "Failed to effectively investigate facts and circumstances or interview witnesses. Failed to let me see my Brady motion. Failed to introduce mitigating documents and testimony at plea. Failed to object when solicitor made plea sentencing recommendations. Failed to file appeal intent. I wrote to attorney and asked him to help me with 10 day appeal and to give me my attorney/client under perhandoc 123 SE 1984 saying that attorney/client file is my property and must be return upon reasonable request. He did not answer my letter so he has subsequently failed to provide attorney client file to aid in research and documentation of PCR application."
2. Solicitor violated plea agreement
    a. "Solicitor violated plea agreement by asking for maximum sentence. Made incorrect and prejudicial statements concerning factual issues and circumstances produced no evidence as to truth of allegations"
3. Judge improperly sentenced
    a. Judge accepted plea even after plea agreement was violated by solicitor.

On January 23, 2018, Respondent filed a Return to Petitioner's application and requested an evidentiary hearing. An evidentiary hearing into the matter was convened on July 26, 2018, at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and represented by Rodney D. Davis, esquire. Respondent was represented by DeShawn H. Mitchell, esquire, of the South Carolina Attorney General's Office. Petitioner proceeded on only two allegations at the evidentiary hearing. First, counsel's alleged failure to object to the solicitor's comments concerning the victim's stance regarding sentencing. Second, counsel's alleged failure to file a notice of appeal after his guilty plea. Petitioner and John Kozelski (plea counsel) both testified during the hearing. Judge Jefferson denied Petitioner relief from the bench and requested a proposed order from Assistant Attorney General Mitchell. Judge Jefferson issued an Order of Dismissal on February 15, 2019 and filed on May 14, 2019.

On June 7, 2019, Petitioner filed a timely notice of appeal through PCR counsel Rodney Davis. Petitioner filed a Petitioner for Writ of Certiorari on December 16, 2019. Petitioner raised the following issue on appeal: Whether Petitioner entered his guilty plea involuntarily because he pled guilty under the impression that the solicitor would stand silent during sentencing, where the solicitor instead said the complaining witness requested that Petitioner be sentenced "closer to the maximum," since Petitioner would not have pled guilty and would have gone to trial had he known that the solicitor was going to make that sentencing request on behalf of the complaining witness?"

This Return to Petition for 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 give great deference 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*, 422 S.C. at 179, 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); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). 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).

ARGUMENT

Petitioner improperly raises for the first time on appeal the issue of counsel's ineffectiveness for failure to advise Petitioner that the solicitor would make a sentencing request on behalf of the victim

Petitioner contends he entered his guilty plea involuntarily because he pled guilty under the impression that the solicitor would stand silent during sentencing, where the solicitor instead said the complaining witness requested that Petitioner be sentenced "closer to the maximum," since Petitioner would not have pled guilty and would have gone to trial had he known that the solicitor was going to make that sentencing request on behalf of the complaining witness. However, Petitioner did not specifically allege in his application or amend his application during the evidentiary hearing to include the allegation that counsel was ineffective for failure to advise Petitioner of the solicitor's obligation to publish the victim's sentencing request.

It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. *E.g., Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997). Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also State v. Nelson,* 331 S.C. 1, 5 n. 6, 501 S.E.2d 716, 718

n. 6 (1998) ("the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court."); 4 C.J.S. *Appeal and Error* § 213 (1993) ("At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon."). Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error. *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Moreover, when issues are not raised by the pleadings but are "tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. Thus, amendments of pleadings are allowed "even after judgment" to conform to the evidence presented at trial. *Id.; see also Kelly v. South Carolina Farm Bureau Mut. Ins. Co.,* 316 S.C. 319, 323, 450 S.E.2d 59, 62 (Ct.App.1994) ("Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result."). *Staubes v. City of Folly Beach*, 339 S.C. 406, 413, 529 S.E.2d 543, 547 (2000).

Petitioner acknowledges in his Petition that there is question as to whether the issue of counsel's alleged failure to advise Petitioner was properly preserved for appellate review. Petitioner initially notes that the failure to advise issue was not addressed as a stand-alone issue by the lower court in the order of dismissal. PWC 4. Petitioner contends that the issue was preserved for appellate review and in the alternative that if the issue was not sufficiently ruled on in the order of dismissal that the case be remanded to the PCR court for specific findings of fact and conclusions of law on this issue. First, Respondent argues that Petitioner's issue was not properly preserved and is being improperly raised for the first time on appeal. Petitioner proceeded on two core issues during the evidentiary hearing; failure to file a notice of appeal and failure to object to the solicitor's comments concerning the victim's sentencing request. Petitioner did not

include the failure to advise allegation in his initial application, he did not amend to include the allegation at the outset of the evidentiary hearing, he did not move to amend to include the allegation at the conclusion of the hearing, he did not argue the merit of the allegation in closing argument, and he did not file a 59(e) motion requesting the Court make specific findings as to this allegation. Neither Petitioner nor Respondent acknowledged this issue or addressed the merits of the issue in closing argument at the evidentiary hearing. In regards to Petitioner's plea issue, PCR counsel solely argued in closing that Petitioner's case was analogous to *Smith v. State* 413 S.C. 194 in that counsel "was deficient for failing to object to the State's recommendation after the State had previously promised to remain silent during sentencing." App. 86. The State simply addressed the issue in closing by stating that the victim's had a statutory right to have their sentencing request made known and the solicitor did not make a sentencing recommendation. Further, as noted by Petitioner, the Court did not directly address the merits of the issue in the order of dismissal. Petitioner cannot now ask this Court to consider the merits of an issue on appeal that was never specifically pled and was not tried by express or implied consent. Therefore, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari, as Petitioner has failed to raise any preserved issues for appellate review.

The post-conviction relief court properly find Petitioner failed to establish counsel was constitutionally ineffective for failing to advise Petitioner the solicitor would be publishing the victim's request for a sentence "closer to the maximum" where counsel testified he would have advised Petitioner of the victim's request and there was no agreement that the State remain silent during sentencing

Petitioner contends his guilty plea was entered involuntarily and unknowingly where plea counsel told him the solicitor would not make any sentencing recommendations or requests during the guilty plea, but where plea counsel failed to inform him that the solicitor would present the plea court with the victim's sentencing request that Petitioner serve "closer to a maximum

sentence.” App. 52, ll. 3-17. However, the post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to advise Petitioner the solicitor would present the victim’s sentencing request where counsel testified he would have advised Petitioner of the victim’s request and where there was no agreement that the State would remain silent during sentencing.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *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). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner 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 Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.,* at 117-18, 386 S.E.2d at 625.

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.

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a

voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984) to claims against guilty plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Hill*, at 56. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Holden v. State*, 393 S.C. 565, 572 - 574, 713 S.E.2d 611, 615 - 612 (2011).

In *Missouri v. Frye*, 566 U.S. 134 (2012), the United States Supreme Court noted that the, "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings [, which] . . . include arraignments, post-indictment interrogations, post-indictment fine ups, and the entry of a guilty plea." *Id.* at 141 (citations and internal quotation omitted). The Court further emphasized that "[i]n today's criminal justice system ... the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." Id. (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations] . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.'" *Id*. at 1408 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (quotation citation omitted).

In the instant case, Petitioner's guilty plea was freely and voluntarily made where counsel testified he would have advised Petitioner of the victim's sentencing request and where the State made no agreement to remain silent during sentencing. First, counsel testified at the evidentiary hearing that he was not one hundred percent sure he shared with Petitioner the victim's sentencing request. App. 38. However, Counsel continued by saying:

> I normally would but it looks like what he wrote me in October right directly before the plea was the vics will not be present but they hope the Judge will give him the maximum. If that is what he wrote me I feel like I would have relayed that to Patrick but I don't have anything in my notes to indicate that I did tell him that.

App. 80, ll. 23-25; App. 81, ll. 1-4. Petitioner testified that plea counsel did not inform him of the complaining witness' sentencing request or that the solicitor would present it to the plea court. App. 83, ll. 13-18. Significantly, Judge Jefferson found plea counsel's testimony credible that he would have reviewed the email from the Assistant Solicitor with Petitioner. App. 112. Counsel's credible testimony, along with Judge Jefferson's credibility finding, show that Petitioner was in fact advised that the victim was requesting that he receive a sentence closer to the maximum. Thus, Petitioner has failed to meet his burden in proving counsel did not advise him of the victim's sentencing request.

Second, Petitioner's impression that "no negotiations and no recommendations" meant that the solicitor would not speak as to sentencing whatsoever was correct, as the record indicates on numerous occasions that the solicitor took no position as a representative of the State in terms of Petitioner's sentence. Plea counsel testified that he explained to Petitioner that his plea was without negotiations or recommendations, meaning "that the solicitor was not going to take a stance as far as what he believes he should get and that it is completely at the judge's discretion." App. 79, ll. 15-19. The PCR Court made a number of findings concerning the status of the plea and whether

or not a recommendation was made by the State. Most significantly, the Court found that there was never a negotiated plea offer in Petitioner's case, as indicated by the State's comments to the plea judge and corroborated by Petitioner's own testimony. App. 112. The Court further distinguished Petitioner's case from that of *Smith v. State*, 413 S.C. 194, 775 S.E.2d 696 (2015). In *Smith*, the Court held the State's recommendation of the maximum sentence was a breach of plea agreement with defendant, which included the State's promise to remain silent during sentencing, that warranted the invalidation of the plea agreement in the manslaughter prosecution. App. 112. The PCR Court found that Petitioner's case was not analogous to Smith in that Petitioner's plea was not negotiated and the State's silence was not one of the terms of the agreement. App. 112. Ultimately, Petitioner failed to cite to any case law supporting the argument that failure to advise as to a victim's right to speak at sentencing constitutes a ground for post-conviction relief and thus has wholly failed to meet his burden in proving that his plea was induced by any misadvise of plea counsel. The PCR court properly denied Petitioner's request for relief, and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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