

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jun 24 2020

CERTIORARI TO RICHLAND COUNTY

S.C. SUPREME COURT

Thomas W. Cooper, Plea Judge
J. Derham Cole, PCR Judge

ZACOATA LOPEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

App. Case No. 2019-000320

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED

Petitioner's Statement of Issues Presented

- I. Whether the PCR court erred by finding that Petitioner had a clear understanding that he had to proceed to trial in order to appeal the family court waiver, that he voluntarily and intelligently chose to enter a guilty plea, and, implicitly, that Petitioner was provided effective assistance of counsel where PCR hearing testimony indicated that Petitioner was not informed that he would need to go to trial in order to appeal his family court waiver hearing issues?

- II. Whether the PCR court erred in (1) finding that Counsel Delaney's and Counsel Davis's testimony was credible with respect to whether they informed Petitioner that he would not be able to appeal his waiver hearing issues unless he went to trial, (2) finding not credible Petitioner's testimony that he was not informed that he could only appeal the family court waiver hearing issues if he went to trial, and would not have pleaded guilty if he known that, and (3) using those findings as a basis for finding that Petitioner pleaded voluntarily and that PCR counsel was not ineffective; where the order incorrectly stated Counsel Delaney's testimony as maintaining that she had told Petitioner that he would need to go to trial to appeal the waiver when her actual testimony was that she did not remember talking to him about the waiver?

Respondent's Counter-Statement of Issues Presented

- I. Whether the PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty where Delaney credibly testified she told Petitioner he had to go to trial to preserve his waiver hearing arguments, and Davis credibly testified she informed Petitioner he had to go to trial to preserve the suppression issue from his family court waiver hearing?

- II. Whether the PCR court correctly made credibility determinations and findings of fact that are supported by the record where the PCR court concluded Delaney told Petitioner he had to go to trial to preserve his family court waiver issues based on Delaney's testimony she thought she advised Petitioner as such, and Davis's testimony she told Petitioner he had to go to trial to preserve the suppression issue from his family court waiver hearing?

STATEMENT OF THE CASE

On December 16, 2010, Investigator Joe Clarke with the Richland County Sheriff's Department filed four juvenile petitions charging Petitioner with armed robbery, first-degree burglary, kidnapping, and first-degree criminal sexual conduct (CSC). ROA 553–59. Thereafter, the State moved to transfer Petitioner's charges from Family Court to General Sessions pursuant to subsection 63-19-1210(5) of the South Carolina Code. Judge James F. Fraley, Jr. presided over the transfer hearing on February 21–22, and March 27–29, 2012. Assistant Solicitors Kathryn “Luck” Campbell, Joanna McDuffie, and Meghan Walker represented the State. Petitioner was represented by Assistant Public Defenders Joanna Delaney (Delaney) and James May. S. Boyd Young was Petitioner's guardian ad litem. ROA 1; 194. After the hearing, Judge Fraley transferred Petitioner's case to General Sessions. ROA 383–92.

Thereafter, Petitioner was indicted for first-degree burglary, armed robbery, kidnapping, and first-degree CSC. ROA 557–58; 560–61; 563–65; 567–68. Petitioner was represented by Assistant Public Defenders Joanna Delaney and Jennifer Davis (Davis). The prosecution remained the same. ROA 394.

On March 12, 2013, Petitioner pleaded guilty to all charges as indicted, without formal negotiations or recommendations, before Judge Thomas W. Cooper, Jr. ROA 394. Judge Cooper accepted Petitioner's guilty plea and sentenced him to serve concurrent terms of thirty years for first-degree burglary, armed robbery, and first-degree CSC. ROA 559; 562; 569. Judge Cooper ordered Petitioner to serve a consecutive sentence of fifteen years for kidnapping, suspended upon the service of five years' probation. ROA 566. Petitioner appealed.

Appellate Defender Susan B. Hackett perfected Petitioner's appeal by filing an *Anders*¹

brief, arguing:

[Petitioner's] due process rights pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Section three of the South Carolina Constitution were violated by the statutory requirement that he register for life as a sex offender where the statute provided no right to a hearing to determine whether [Petitioner] was a sex offender and provided no judicial review after a term of years to determine whether [Petitioner] should remain on the registry.

App. 89. The court of appeals dismissed the appeal after *Anders* review. App. 105. The case was remitted back to the circuit court on March 10, 2015. App. 103.

Petitioner commenced the underlying PCR action on February 5, 2015 alleging he was unlawfully in custody due to ineffective assistance of counsel, newly discovered evidence, and he was a minor tried as an adult. App. 106–111. Petitioner amended his PCR allegations on August 24, 2015, alleging ineffective assistance of plea counsel for failing to have Petitioner testify at the waiver hearing, and ineffective assistance of appellate counsel for failing to properly argue the statement for the basis of the direct appeal. App. 112.

An evidentiary hearing into the matter convened before Judge J. Derham Cole on February 1, 2016. App. 120. Petitioner was present and represented by Anna R. Good. Assistant Attorney General J. Clayton Mitchell, III, represented the State. App. 120. Judge Cole denied relief and dismissed the action with prejudice on February 19, 2019. App. 170–86. Petitioner appealed. App. 190.

¹ *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF THE FACTS

Petitioner's charges stem from a home-invasion on December 14, 2010. App. 15. Around 8:45 p.m. that night, Petitioner and his co-defendant, Larry Prophet, broke into eighty-year-old Elaine Henrick's (Victim) home armed with a shotgun. App. 16. Petitioner and Prophet held Victim at gunpoint and took turns searching the home for valuables. App. 17. After ransacking the house, Petitioner and Prophet told Victim to go into the bathroom and disrobe. App. 17.

The robbers then forced Victim into her bedroom and onto the bed. Prophet gave the gun to Petitioner, then vaginally raped Victim. App. 17. When Prophet finished, Petitioner gave him the gun. App. 17. Victim begged for mercy and asked Petitioner if "he would do the same thing to his own grandmother." App. 17. In response, Petitioner anally raped Victim. App. 17. Thereafter, Petitioner and Prophet left Victim's home. App. 17. Victim called law enforcement and was transported to the hospital. App. 18. Prophet's semen was found on the carpet in Victim's bedroom. App. 21. Petitioner's semen was present in Victim's rectum and on a tissue she used to clean herself after being raped. App. 21.

Deputy Ben Fields was the school resource officer at Spring Valley High School and had several encounters with Petitioner. App. 22. The day after the incident, Fields notified investigators he believed Petitioner was involved in the incident. App. 23. Investigators Joe Clarke and John Miller went to Spring Valley and spoke to Petitioner. Petitioner confessed to breaking into Victim's house, robbing her, holding her at gunpoint, and raping her. App. 19.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate courts 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).

ARGUMENT

- I. The PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty because Delaney credibly testified she told Petitioner he had to go to trial to preserve his waiver hearing arguments, and Davis credibly testified she informed Petitioner he had to go to trial to preserve the suppression issue from his family court waiver hearing

Petitioner argues his guilty plea was unknowing and involuntary due to ineffective assistance of plea counsel because plea counsel failed to advise him that he had to go to trial to preserve his family court waiver hearing issues. Petitioner's argument is purely factual. Petitioner's argument fails because Delaney and Davis both credibly testified they informed Petitioner he had to go to trial to preserve issues raised during the family court waiver hearing. Certiorari should be denied because the PCR court's factual findings are supported by the record.

Appellate courts will uphold the PCR court's factual findings if there is any evidence in the record to support them. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527. Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye*, 335 S.C. at 589, 518 S.E.2d at 267.

The PCR court found Petitioner knew he had to go to trial to preserve issues from his waiver hearing. This finding is supported by Delaney and Davis's credible testimony. At the PCR hearing, Delaney testified, "I think we talked about jurisdiction, that you can raise jurisdiction at any stage of the case. . . . I saw a case recently that was from 2013, and it said if you have a waiver hearing you have to go to trial in order to appeal the waiver. I think we told [Petitioner] that" App. 144. On cross-examination, when asked if she told Petitioner he had to go to trial if he wanted to appeal the issues from the waiver hearing, Delaney responded, "I think so. I, again, generally tell clients you are very - - it's very difficult to get an appeal on a plea." App. 152. Davis testified, "I specifically recall talking to him about the motion to suppress the statement . . . that we would have that as an appeal issue but that . . . we would have to go to trial in order to do that." App. 159-60.

The PCR court found "although [Davis] could not specifically recall whether or not she discussed with [Petitioner] his ability to appeal the waiver hearing issues from family court, she specifically recalled explaining to him he would need to proceed to trial if he wanted to preserve the suppression issue." App. 185. Further, the PCR court found "Delaney testified she explained to [Petitioner] he would need to proceed to trial if he wanted to appeal the waiver. She also testified she discussed the appeal with [Petitioner], and she typically advises all of her clients it is very unlikely to get an appeal granted from a guilty plea." App. 185. Based on Delaney and Davis's testimony, the PCR court found Petitioner was aware he needed to go to trial to be able to appeal anything from his family court waiver hearing. Certiorari should be denied because the PCR court made a factual finding that Petitioner knew he had to go to trial to preserve his family court waiver hearing issues, and the PCR court's finding is supported by the record.

II. The PCR court correctly made credibility determinations and findings of fact that are supported by the record; specifically, the PCR court found Delaney told Petitioner he had to go to trial to preserve his family court waiver issues based on Delaney's testimony she thought she advised Petitioner as such

Petitioner argues the PCR court erred in finding Delaney and Davis credible, and Petitioner not credible. Petitioner further argues the PCR court erred in finding Petitioner knowingly and voluntarily pleaded guilty based on its above stated credibility findings. Finally, Petitioner argues the PCR court erred in finding that Delaney told Petitioner he had to go to trial to preserve his family court waiver hearing issues. Certiorari should be denied based on the standard of review.

a. *Credibility*

The PCR court correctly made credibility determinations. PCR court's credibility determinations are afforded "great deference" because appellate courts lack the opportunity to directly observe the witnesses. *Foye*, 335 S.C. at 589, 518 S.E.2d at 267. Here, the PCR court presided over the evidentiary hearing and observed Petitioner's, Delaney's, and Davis's testimony. The PCR court found Delaney and Davis credible, and Petitioner not credible. This Court should defer to the PCR court's credibility determinations.

b. *Findings of fact*

The PCR court properly found Delaney told Petitioner he had to go to trial to preserve his family court waiver issues. As noted above, Delaney testified, "I think we talked about jurisdiction, that you can raise jurisdiction at any stage of the case. . . . I saw a case recently that was from 2013, and it said if you have a waiver hearing you have to go to trial in order to appeal the waiver. I think we told [Petitioner] that" App. 144. Davis testified, "I specifically recall talking to him about the motion to suppress the statement . . . that we would have that as an appeal issue but that . . . we would have to go to trial in order to do that." App. 159–60.

Petitioner argues the PCR court erred in relying on Delaney's testimony that she thought she told Petitioner he had to go to trial to appeal the waiver. However, *Strickland* provides "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. 668, 690 (1984).

The PCR court found "although [Davis] could not specifically recall whether or not she discussed with [Petitioner] his ability to appeal the waiver hearing issues from family court, she specifically recalled explaining to him he would need to proceed to trial if he wanted to preserve the suppression issue." App. 185. Further, the PCR court found "Delaney testified she explained to [Petitioner] he would need to proceed to trial if he wanted to appeal the waiver. She also testified she discussed the appeal with [Petitioner], and she typically advises all of her clients it is very unlikely to get an appeal granted from a guilty plea." App. 185. The PCR court concluded, based on Delaney and Davis's credible testimony, "[Petitioner] had a clear understanding he had to proceed to trial in order to appeal the waiver and voluntarily and intelligently chose to enter a guilty plea." App. 185–86. The PCR court properly applied *Strickland* in finding that Delaney told Petitioner he had to go to trial to preserve his family court waiver arguments. Certiorari should be denied.

Finally, Petitioner asserts his case should be remanded back to the PCR court for a new hearing and proper findings of fact and conclusions of law on this issue. In making this assertion, Petitioner cites *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337 (2008), implying he was denied his "full bite at the apple." However, the PCR court ruled on all the issues presented and a remand is unnecessary. The PCR court found Petitioner knew he had to go to trial to appeal his family court waiver issues. The PCR court concluded Petitioner knowingly and voluntarily pleaded guilty knowing he could not appeal his waiver hearing issues unless he went to trial. App. 185. While the

PCR court may not have set off this ruling in its own subsection as it did for the other two issues presented, the PCR court still ruled on the issue. Therefore, a remand is unnecessary.

CONCLUSION

Based on the foregoing, Petitioner failed to satisfy he received ineffective assistance of counsel or involuntarily pleaded guilty. Both of Petitioner's arguments are factual arguments against the deferential standard of review. The PCR court found Petitioner knew he had to go to trial to appeal his family court waiver hearing issues. The PCR court's finding is amply supported by the record. Further, the PCR court believed Delaney told Petitioner he had to go to trial to appeal the family court waiver issues based on Delaney's testimony she thought she advised Petitioner as such. This Court should defer to the PCR court's credibility finding. Certiorari should be denied as to both issues presented based on the standard of review.

Respectfully submitted,

s/ Samuel L. Key

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