

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Trial Judge
The Honorable John C. Hayes, III, PCR Judge

Appellate Case No.: 2019-001535

DASHON A. GARNER.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Whether the PCR court erred in finding Petitioner's guilty plea knowing and voluntary where Petitioner was induced to plead guilty by plea counsel who erroneously informed Petitioner that he would receive a life sentence if he proceeded to trial.

Respondent's Counterstatement of Issue on Certiorari

Whether the post-conviction relief court properly found Petitioner failed to establish his plea was unknowing and involuntary where Counsel properly informed Petitioner of the likelihood of a long sentence that would effectively result a de facto life sentence if he were convicted at trial, which counsel advised was highly likely based on his experience and review of the evidence and possible defenses, and Petitioner acknowledged the potential sentences for each charge on the record during his guilty plea.

STATEMENT OF THE CASE

Dashon Garner (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its May 2015 term, the Horry County Grand Jury indicted Petitioner for four counts of Attempted Murder (2015-GS-26-01879, -01902, -01903, and -01907) and Carjacking (2015-GS-26-01909) Petitioner was represented by Ralph Wilson, Jr., Esquire (hereafter “Counsel”). Assistant Solicitor George DeBusk, Esquire, from the Fifteenth Circuit Solicitor’s Office, represented the State. On February 21, 2017, Petitioner pled to before the Honorable Steven H. John to four counts of assault and battery of a high and aggravated nature and carjacking and a negotiated sentence of eighteen years’ imprisonment.¹ Judge John sentenced Petitioner to eighteen years’ imprisonment, sentences running concurrently. Petitioner did not appeal his plea or sentence.

Petitioner timely filed a PCR application on January 9, 2018, alleging:

1. “Ineffective Counsel.”
 - a. “In pleading guilty the Applicant’s plea of guilty was not freely and voluntarily given because his counsel threaten[ed] him that he would lose trial and be sentenced to life in prison if he as much spoke at the pretrial hearing.”
 - b. “defense counsel failed to investigate properly in preparing for trial although with some preparation there could have been different results in the court procedures.”
 - c. “With in his time of being retained, dfense counsel did no kind of defending of

¹ The following charges were *nolle prosequi* indicted and dismissed as a part of the negotiated plea agreement: three counts of Attempted Murder (2015-GS-26-1880, -1904, and -1905), Failure to Stop for a Blue Light (2015-GS-26-1881), Grand Larceny (2015-GS-1899), Possession of Cocaine, First Offense (2015-GS-26-1990), Possession of Cocaine Base (2015-GS-26-1901), and two counts of Possession of a Weapon During a Violent Crime (2015-GS-26-1906, and -1908). In November 2015, Petitioner was indicted for Threatening State’s Witness (2015-GS-26-04556). In September 2016, Petitioner was indicted for Kidnapping (2016-GS-26-03870), Attempted Armed Robbery (2016-GS-26-03871), Possession of a Weapon During the Commission of a Violent Crime (2016-GS-26-03872), First Degree Attempted Criminal Sexual Conduct (2016-GS-26-03873), and Assault and Battery of a High and Aggravated Nature (2016-GS-26-03874). Petitioner was also charged, but not indicted, for Obstruction of Justice (2015 A26 10201892).

the sort for the defendant until Feb. 17, 2017 when he filed four pretrial motions (severance of indictments motion, notice of defendants intention to offer an alibi, motion to suppress, motion for bond); but on Feb. 23, 2017, before the pretrial hearing counsel refused to present any of the motions then [lying] to both the defendant and his family, forcing him to plead out.”

- d. “Defense counsel never fought for the venue to be changed even though it was a major conflict of interest in the case since said crimes were committed against public officials of that country.”
- e. “The defendant felt he had no other choice but to plead out after 2 years of telling his first counsel, J.M. “Buddy” Long III, then Ralph Wilson Jr., both his wishes to preside in trial. Doing so several times in letters and in person. They both ignored evidence in favor of the defendant. J.M. Long III actually said as much in the plea agreement he sent to Solicitor George H. Debusk, Jr. Oct. 2015.”

Respondent made its Return on March 21, 2018, requesting an evidentiary hearing. The evidentiary hearing occurred on June 20, 2019, before the Honorable John C. Hayes, III. James K. Falk, Esquire, represented Petitioner. Jacob A. Isenberg of the South Carolina Attorney General’s Office represented Respondent. Petitioner proceeded forward on the above mentioned allegations. Following the evidentiary hearing, the PCR court denied and dismissed the application in full, through a written Order of Dismissal dated August 13, 2019, finding:

1. Petitioner knowingly and voluntarily entered his guilty plea.
2. Petitioner did not overcome his burden of proof in proving Counsel was deficient or Petitioner prejudiced by Counsel’s alleged failure to investigate a potential alibi defense when he did not call alibi witness Vereen as a witness at the PCR hearing or otherwise indicate what the witness would have said, had Counsel investigated and called the witness.
3. Counsel was not deficient and Petitioner was not prejudiced by Counsel’s alleged failure to prepare an alibi defense because, even though Counsel never interviewed witness Bufkin, Counsel acted reasonably because Petition was charged with witness tampering with potential witness Bufkin.
4. Counsel was not ineffective for failure to prepare a third-party guilt defense because Counsel reasonably investigated the claim and Petitioner failed to present any admissible statements from the then-deceased individual that corroborated his allegation.
5. Counsel was not ineffective for failure to request a change of venue because Petitioner failed to show how the venue impacted his ability or decision to plead guilty.
6. Counsel was not ineffective for failure to review discovery with Petitioner because Counsel credibly testified he reviewed all discovery with Petitioner and Petitioner did not show how the improper identification affected his decision to plead.

This appeal follows.

STATEMENT OF FACTS

Myrtle Beach Police Department received a call concerning a drunk driver. (Appx. 9). The officers found the vehicle, which turned out to have a stolen plate attached. (Appx. 9-10). Officers pursued the vehicle through the park, which turned into a brief manhunt in the park, through which Petitioner was relocated. (Appx. 10). Four officers pursued Petitioner while Petitioner was fleeing through the park. (Appx. 10). Petitioner fired several shots at the officers while fleeing. (Appx. 10).

An hour and a half thereafter, after Petitioner alluded the police, he approached the victim, Robbie Buffkin, at a gas station. (Appx. 10). While taking Buffkin's vehicle, Petitioner shot Buffkin in the stomach and groin, which required serious medical treatment. (Appx. 10).

The police put a BOLO out on a purple Mercedes Benz. (Appx. 10). After pursuing the vehicle to the end of a dead end street, the officer got out of his vehicle. Petitioner drove straight at the officer, brushing and ultimately hitting the officer on the side of the leg, when he was standing on the running board of his car, trying to avoid being hit. (Appx. 11).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCPP; *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). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly find Petitioner failed to establish his plea was unknowing and involuntary where Counsel properly informed Petitioner of the likelihood of a long sentence that would effectively result a de facto life sentence if he were convicted at trial, which counsel advised was highly likely based on his experience and review of the evidence and possible defenses, and Petitioner acknowledged the potential sentences for each charge on the record during his guilty plea.

On appeal, Petitioner argues the PCR court erred in denying him relief because his plea was invalid because Counsel allegedly incorrectly told him he would face life imprisonment if he proceeded to trial. However, the PCR court properly rejected this argument, finding that Counsel did not misadvise Petitioner and the plea was entered knowingly and voluntarily. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC (“The applicant

has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters ““only in the rarest case”” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

Regarding guilty pleas specifically, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness inherently included in the plea's judicial procession. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the petitioner must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Here, the plea was entered freely, knowingly, intelligently, and voluntarily. Petitioner waived his right to a jury trial, remain silent, present and cross-examine witnesses, to enter and present evidence, and to present a defense. (App. 6-8). Petitioner was informed of the charges and sentencing ranges he was subject to by pleading to the charges. (App. 2-4). Petitioner stated he understood the charges pled to were violent and serious offenses that affect sentencing lengths and if he was charged with another serious or most serious offense, the State would seek life imprisonment without the possibility of parole. (App. 4-5). Petitioner stated he understood he was pleading to a negotiated sentence of eighteen years imprisonment on every charge, sentences running concurrently. (App. 5). Petitioner stated he was not on any substance affecting his ability to understand the pleading. (App. 6). Petitioner stated he was pleading freely and voluntarily, of his own free will and accord, and was not promised or threatened into pleading. (App. 7-8). Petitioner stated he was satisfied with Counsel’s performance, that he did not have complaints concerning Counsel’s help and representation, and that he did not need to talk to Counsel about anything else. (App. 8-9).

Additionally, at the PCR hearing, Counsel credibly testified that, given the number of offense Petitioner was charged with, he was facing a total of up to two hundred and seventy four years if sentences ran consecutively. (App. 70). Thus, Counsel stated he discussed the possibility

of life imprisonment with Petitioner if he proceeded to trial. (App. 70-72). Counsel stated that, given the sheer number of years Petitioner would be exposed to at trial, he effectively would, in all likelihood, be sentenced to a de facto life sentence if convicted at trial. (App. 34-35). Counsel stated he thought pleading was in Petitioner's best interest and told him that many times over a "long period of time". (App. 72-73). Counsel stated that he thought Petitioner had a ninety-five percent chance of losing at trial and facing a long prison sentence. (App. 75).

Counsel's advice to plead because Petitioner would likely effectively be sentenced to life imprisonment if convicted at trial was not incorrect, given the serious nature of the charges, the large amount of charges he was facing, and the likelihood of being found guilty at trial. Even if the advice was incorrect, however, the misunderstanding or incorrect advice was remedied through course of the plea colloquy. Petitioner was informed of the sentencing ranges applicable to every charge pled to by the plea hearing judge. After being informed of the sentencing ranges, Petitioner still decided to plead. Thus, Petitioner plea was entered validly and cannot be withdrawn now.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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