

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Sumter County
Robin B. Stillwell, Plea Judge
Brooks P. Goldsmith, Post-Conviction Relief Judge

S.C. SUPREME COURT

Appellate Case No. 2019-001557

RICARDO DARGAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE ON CERTIORARI

Petitioner's Issue on Certiorari

Trial counsel erred in advising petitioner to end his trial and plead guilty to the lesser offense of voluntary manslaughter after the trial judge denied immunity at the close of a pre-trial Castle Doctrine hearing because the jury had already been selected for trial and there was evidence in existence in the case to support self-defense, the defense of accident, and the lesser offense of involuntary manslaughter if he had elected to continue with his jury trial.

Respondent's Counterstatement of Issue on Certiorari

The post-conviction relief court properly found Petitioner failed to establish any constitutional deprivations entitling him to post-conviction relief, where counsel properly advised Petitioner of his likelihood of conviction at trial and possible sentences following the denial of his pre-trial immunity hearing based on the Protections of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.) and Petitioner made a knowing, voluntary, and intelligent decision to forgo trial and plead guilty to the lesser-included offense of voluntary manslaughter.

STATEMENT OF THE CASE

Petitioner Ricardo Dargan is presently confined within the South Carolina Department of Corrections serving an aggregate twenty-year sentence. During its March 2016 term, the Sumter County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime (2016-GS-43-0378) and three counts of distribution of crack cocaine base (2016-GS-43-0376, -77, and -78). Timothy Griffith, Esquire (Counsel) represented Petitioner on the charges. Assistant Solicitor Bronwyn K. McElveen of the Third Circuit Solicitor's Office prosecuted the case.

Petitioner sought immunity from prosecution under the South Carolina Protection of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.). On October 17, 2016, Petitioner proceeded to a pre-trial immunity hearing before the Honorable Robin B. Stillwell, circuit court judge. Petitioner testified on his own behalf and presented a fact witness. The State then presented two fact witnesses. Following the hearing, Judge Stillwell denied Petitioner's request for immunity from prosecution.

Following the denial of immunity, Petitioner elected to forego his jury trial and enter guilty pleas to the lesser included offense of voluntary manslaughter and as indicted to possession of a weapon during the commission of a violent crime and all three counts of distribution of crack cocaine. Judge Stillwell sentenced Petitioner to imprisonment for concurrent terms of fifteen years for voluntary manslaughter and fifteen years for each of the three distribution charges along with a consecutive five years for the weapons charge, for an aggregate sentence of imprisonment for twenty years.

Petitioner filed a notice of appeal on November 15, 2016. By order dated January 12, 2017, the South Carolina Court of Appeals dismissed Petitioner's appeal for failure to timely

serve the Notice of Appeal on Respondent as required by Rule 203(b) of the South Carolina Appellate Court Rules. State v. Dargan, S.C. Ct. App. Order Filed January 12, 2017. The remittitur was issued on February 2, 2017.

Thereafter, on July 5, 2017, Petitioner timely sought post-conviction relief on a number of grounds, including on the basis trial counsel was purportedly ineffective for advising him to plead guilty. Respondent filed its return and requested an evidentiary hearing to resolve the claims.

On July 30, 2019, an evidentiary hearing was convened before the Honorable Brooks P. Goldsmith, circuit court judge. At the conclusion of the hearing, Judge Goldsmith denied relief. A formal order denying and dismissing all claims was signed August 28, 2019, and filed September 6, 2019.

STATEMENT OF FACTS

Petitioner's charges stem from a number of distinct crimes committed over the course of a roughly six-month span in 2015. As to the murder and weapon charges, during the early morning hours of December 3, 2015, Petitioner and his close friend David Clea went to a night club with two other individuals. After leaving the club, Petitioner and Clea agreed to participate in an illegal street race. Each man put up a five-hundred-dollar wager, with the winner to receive all proceeds, and Clea held the money. Both men had been drinking, and while Clea had friend Marcia Hayward drive his car due to his intoxication, Petitioner drove his own vehicle in the race. Following the race, Clea was declared the winner to the ire of Petitioner, who followed Clea to Ms. Hayward's house and demanded his money. When Clea refused his demands, Petitioner left Ms. Hayward's house and retrieved a gun that he shared with Clea. Although Clea had purchased the weapon, it was commonly carried by Petitioner. Petitioner then returned to

Ms. Hayward's house, where he began firing the weapon at Clea's feet while demanding the money. One of the bullets struck Clea, who fell to the ground. Petitioner then took the money from Clea as he lay injured on the ground and fled the scene. Petitioner was apprehended by law enforcement nearby a short time later. As a result of the shooting, Clea suffered a tear to his femoral artery, requiring extensive surgery to repair. Following significant hospitalizations, Clea developed an infection directly caused by the bullet wound and succumbed to his injuries fifty-seven days after the shooting. (App. 79-80).

Meanwhile, as to Petitioner's drug charges, Petitioner sold an undercover confidential informant crack cocaine on three separate occasions in July and August 2015. (App. 82-83).

Prior to trial, Petitioner sought immunity from prosecution under the Protection of Persons and Property Act. Following jury selection but before the jury was sworn, a pre-trial immunity hearing was held. Petitioner testified on his own behalf and claimed he and Clea had been "best friends" for seventeen years. (App. 36). He asserted the altercation with Clea was because Clea owed him other money separate and apart from the race money and the victim brandished the firearm in response to his request to be repaid. (App. 37-38). He claimed Clea owned the firearm, was known to pull the gun on others, and was carrying it earlier that day. (App. 38-39). Petitioner claimed he felt threatened and thought Clea might shoot him, so he grabbed Clea's wrist and the gun began to fire. (App. 39-42). He claimed he forced the gun to the ground (App. 39-40). He asserted he never had possession of the gun, never pointed the gun at Clea, and was purely acting in self-defense. (App. 39-40). He claimed he did not even realize Clea had been shot until he screamed. (App. 40). He asserted he did nothing to provoke Clea, did not have a weapon, and was in fear for his own life. (App. 38-42). He claimed he left the scene because he was going to inform Clea's fiancée that Clea had been shot. (App. 42, 44-45, 47). He

asserted he never fired the gun, but rather, that the gun “went off” without him firing it and he never had control or possession over the gun. (App. 43-44).

Thomas Wilson testified next at the immunity hearing and stated he was drinking with Petitioner and Clea the evening and early morning hours of the incident. (App. 48-49). He testified he did not see Clea with a gun that day and does not know Clea to carry a gun. (App. 49). He did, however, see Petitioner with a gun that day. (App. 49-50). Wilson testified Petitioner left Ms. Hayward’s house and returned a short time later with a gun. (App. 50-52). Wilson testified Petitioner began firing the gun into the ground while demanding his money and Clea replied he was not going to give Petitioner money. (App. 50-53). He testified he and Ms. Hayward then ran to avoid being stuck by the flurry of bullets and heard Clea scream shortly thereafter that he had been shot. (App. 50-52). Wilson testified he did not see Clea threaten or provoke Petitioner. (App. 51).

Marcia Hayward, who is Petitioner’s first cousin and a close friend of Clea, also testified at the immunity hearing. (App. 53-54). She testified the three of them went to the club that evening/early morning along with Thomas Wilson. (App. 54-55). She testified upon leaving the club, she and Petitioner engaged in a street race with Petitioner and Clea placing wagers. (App. 55-56). She testified she won the race, but Petitioner demanded his money back and Clea refused. (App. 56). She testified she, Wilson, and Clea went to her house and Petitioner arrived a few minutes later with a gun. (App. 56-57, 59-60). She testified Petitioner again demanded his money back, and when Clea refused, Petitioner began to fire the weapon repeatedly at their feet. (App. 57-58). She described Petitioner as “a drunk man with a gun shooting erratically in my front yard” and Petitioner was firing the weapon “repeatedly.” (App. 58). She testified she was trying to get her children back inside the house when she heard Clea scream that he had been

shot. (App. 58). She testified she never saw Clea advance on Petitioner and Clea did not have a weapon. (App. 59-60). She explained while Clea had purchased the gun that was used, it was shared between him and Petitioner and Petitioner “was known for toting the gun. He always tote that gun.” (App. 59). She described Petitioner as “the gun man.” (App. 59).

Finally, the State presented Ms. Hayward’s minor daughter, who was inside the house during the shooting. (App. 61-62). She stated she heard Petitioner ask Clea, “where my money at?” but it was too dark to see who had the weapon or whether Clea was trying to hurt Petitioner. (App. 62). She also heard Clea say to Petitioner, “you’d shoot me with my own gun.” (App. 63).

Following the hearing, Judge Stillwell denied immunity, finding Petitioner failed to establish that he was entitled to immunity pursuant to the act. (App. 65-66).

The following day, Petitioner entered a guilty plea to the lesser included offense of voluntary manslaughter and all other charges as indicted. During his plea, Petitioner informed Judge Stillwell he wanted to plead guilty, he understood the penalty range for each offense and the constitutional rights he was waiving by entering a guilty plea, and was satisfied with counsel’s representation. He also informed the court he shot the gun and apologized to the court for his testimony during the immunity hearing. He also thanked counsel and commented he believed the prosecutor “did a great job here.” Judge Stillwell sentenced him at an aggregate term of twenty years’ imprisonment. (App. 71-90).

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. 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

The post-conviction relief court properly found Petitioner failed to establish any constitutional deprivations entitling him to post-conviction relief, where counsel properly advised Petitioner of his likelihood of conviction at trial and possible sentences following the denial of his pre-trial immunity hearing based on the Protections of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.) and Petitioner made a knowing, voluntary, and intelligent decision to forgo trial and plead guilty to the lesser-included offense of voluntary manslaughter.

On appeal, Petitioner asserts the post-conviction relief court erred by finding counsel was not constitutionally ineffective for advising Petitioner to end his trial and plead guilty because the jury had been selected and there was evidence to support various defenses and lesser-included offenses if he had continued forward with trial. Specifically, Petitioner argues evidence supported self-defense, accident, and involuntary manslaughter and counsel was constitutionally ineffective for advising Petitioner to accept the State's plea offer rather than continue forward with his trial and pursue these defenses and lesser-included offenses. However, the record firmly establishes counsel, after a full investigation and review of all discovery, proceeded forward to an immunity hearing, where numerous witnesses testified consistently and "very, very credibly" that Petitioner was the aggressor who shot Clea over a financial dispute, then stole money and fled the scene. The record established that after this hearing and the denial of immunity, counsel advised Petitioner he would likely be convicted at trial based on the credible evidence the State would present and advised Petitioner it was in his best interest to accept the State's plea offer to the lesser-included offense of voluntary manslaughter. Moreover, the record firmly establishes Petitioner knowingly, intelligently, and voluntarily entered his guilty plea with the advice of competent counsel to avoid all but certain conviction at trial in light of the credible and convincing testimony presented at the immunity hearing and Petitioner's desire to avoid a mandatory minimum term of thirty years' imprisonment if convicted a trial. The post-conviction

relief court properly determined counsel was not constitutionally ineffective in his representation of Petitioner and Petitioner's plea was knowing, voluntary, and intelligent. These findings are not controlled by an error of law and are supported by the record. This Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct “was so ineffective as to require reversal” of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel.” Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

When reviewing a guilty plea, the analysis of counsel's performance under the first prong

of Strickland remains unchanged—the applicant must show counsel’s representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel’s advice to plead guilty was not “within the competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56.

The second, or “prejudice” prong, however, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Id. at 58–59. Specifically, when an applicant claims counsel’s deficient performance caused him to accept a plea, the applicant “must show that there is a reasonable probability that, but for [plea] counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. This inquiry “focuses on a defendant’s decisionmaking” and does not turn on the outcome of a defendant’s actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland’s high bar is never an easy task, and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” Lee, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 (“[R]equiring a ‘prejudice’ showing from defendants who seek to challenge the validity of their

guilty pleas on the ground of ineffective assistance of counsel ‘will serve the fundamental interest in the finality of guilty pleas.’”). Reviewing “[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Lee, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should “look to contemporaneous evidence to substantiate a defendant’s expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

“[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced.” Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty or no contest, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant’s choice. Id. at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty or no contest plea, the defendant must be advised of the

constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty or no contest, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The State may properly encourage guilty or contest pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. North Carolina v. Alford, 400 U.S. 25, 37 (1970). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id. at 31.

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 court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty or no contest plea, the trial judge "usually questions the defendant about the facts surrounding

the crime and punishment that could be imposed.” Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge “does not have to direct the defendant’s attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea.” Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, “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.” Harres, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty or no contest plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant’s claim his lawyer misadvised him).

An applicant who enters a plea on the advice of counsel may “only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the [Applicant] would not have pled guilty, but would have insisted on going to trial.” Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In the present case, Petitioner failed to meet his burden of proof of establishing his counsel was ineffective or his plea was not knowingly, voluntarily, or intelligently entered. The record from the general sessions proceeding and the post-conviction relief proceeding all

establish Petitioner entered a knowing, voluntary, and intelligent plea with the advice of competent counsel, who was thoroughly prepared for trial, challenged the State's evidence through a pre-trial immunity hearing, and ultimately advised Petitioner to accept a favorable plea offer from the State based on the strength of the State's case as evidence through the credible, consistent testimony at the immunity hearing establishing Petitioner as the aggressor and the one in possession of the firearm.

The record clearly establishes counsel was properly prepared for trial. Counsel fully investigated the facts of the case, including attempting to locate any witnesses provided by Petitioner or his family and reviewed all discovery materials with Petitioner. (App. 154-55, 158, 166-67). Counsel met with Petitioner eight times and spoke with him countless times by telephone in preparation for the immunity hearing and trial. (App. 167). Counsel testified he was optimistic about Petitioner's case until the immunity hearing, where the witnesses, which counsel characterized as "very, very credible," consistently testified Petitioner was the armed aggressor and Clea was the unarmed victim of Petitioner's wrath. (App. 150-163). Following the denial of the immunity hearing, counsel testified he advised Petitioner that the witnesses appeared "very, very credible" when testifying he was the aggressor who shot Clea and the case would turn on whether the jury believed these "very, very credible" witnesses or Petitioner, which he believed would likely result in a murder conviction. (App. 150-173). Counsel testified he advised Petitioner it was in his best interest to accept the State's plea offer to the lesser included offense of voluntary manslaughter. (App. 173). Counsel stressed repeatedly that he was thoroughly prepared for trial, liked trying cases, and told Petitioner he was ready to proceed to trial should Petitioner want to do so. (App. 150-73). After these discussions, Counsel credibly testified that Petitioner advised counsel he had not been truthful in their discussions and his testimony at the

immunity hearing. (App. 171). Petitioner similarly apologized to Judge Stillwell during his plea for his testimony at the immunity hearing—an apparent admission he was untruthful while testifying. (App. 88). He also admitted to shooting the gun. (App. 82). Petitioner acknowledged he was satisfied with counsel, understood the sentencing and other consequences of his plea, and wanted to waive his constitutional rights and forgo trial to plead guilty. (App. 71-89).

In its order of dismissal, the post-conviction relief court specifically found counsel's testimony as to his preparation for trial and credible and found counsel was sufficiently prepared and rendered effective assistance of counsel. The court further found the record clearly established Petitioner's plea was knowing, voluntary, and intelligent. Ample evidence supports these findings. The post-conviction relief court properly denied relief and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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