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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Derham Cole, Trial Judge
The Honorable G. Thomas Cooper, PCR Judge

Appellate Case No. 2020-000140

TAVARIS DEWBERRY.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Statement Issue on Certiorari

Whether the PCR court erred where it found counsel effectively represented Petitioner Dewberry on the charges if attempted murder, armed robbery, and burglary, where counsel failed to advise Petitioner that the State had to prove that Petitioner, rather than just his co-defendant, had a specific intent to kill in order to convict Petitioner of attempted murder, and where Petitioner would have continued with his trial on the offenses had he known of this element, since Counsel's deficient representation resulted in Petitioner's entry of pleas that were not knowingly, voluntarily, and intelligently made?

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective when Counsel credibly testified he informed Petitioner of the specific intent requirement and Petitioner was not prejudiced by any alleged deficiency?

STATEMENT OF THE CASE

Tavaris Dewberry (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its August 2015 term, the Spartanburg County Grand Jury indicted Petitioner for three counts of armed robbery (2015-GS-42-3859, -3860, and -3861), attempted murder (2015-GS-42-3862), and first degree burglary (2015-GS-42-3863). Petitioner was represented by Michael Morin, Esquire (hereafter "Counsel"). Solicitor Barry Barnette and Assistant Solicitor Spenser Smith, from the Seventh Circuit Solicitor's Office, represented the State. On February 22, 2017, Petitioner pled to the lesser-included offense of second degree burglary, one count of armed robbery, and attempted murder, before the Honorable J. Derham Cole, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).[1] Judge Cole sentenced Petitioner to eighteen years' imprisonment for armed robbery and attempted murder and fifteen years' imprisonment for second degree burglary, with sentences running concurrently. Petitioner did not appeal his sentence or conviction.

Petitioner timely filed a PCR application on December 18, 2017, alleging:

1. "Denial of effective assistance of counsel."
    a. "Failure to investigate"
    b. "Failure to adequately prepare for trial."
    c. "Laboring under conflicting interests."

Respondent made its return on April 12, 2018. Petitioner filed an amended PCR application on November 8, 2018, alleging:

1. "Ineffective Assistance of Counsel."
    a. "failure to advise Applicant of plea offer;"
    b. "advising him to plea under *Alford* without a proper inducement or benefit;"
    c. "failure to advise the Applicant that the State would have to prove to a jury

[1] Pursuant to the plea offer, the two additional counts of armed robbery were dismissed.

that he had a specific intent to kill to get a conviction for attempted murder under *State v. King*, 412 S.C. 403 772 S.E.2d 189 (Ct. App. 4/22/15) which would be difficult under accomplice liability theory;"

d. "failure to review discovery with the Applicant prior to his plea;"
e. "failure to advise Applicant that his right to appeal the ruling on his pretrial motion to suppress his statement would be waived if he pled guilty; and"
f. "failing to appeal the plea and sentence on behalf of the Applicant."

2. "Due process violations because the plea was not knowingly and voluntarily made because the Applicant was not advised that the guilty plea would waive his right to appellate review of the court's ruling on his pretrial motion to suppress and the co-defendant received probation."

The evidentiary hearing occurred on October 8, 2019, before the Honorable G. Thomas Cooper. Susannah Ross, Esquire represented Petitioner. Assistant Attorney General Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

The Court issued an Order of Dismissal, denying Petitioner's Post-Conviction Relief Application and request for relief and remanding him to the custody of South Carolina Department of Corrections on January 6, 2020, based upon the following findings:

1. Petitioner was not prejudiced by any misadvise given to Petitioner regarding a potential sentencing cap of fifteen years because an adequate colloquy concerning the applicable ten to thirty year sentencing range was held at the plea hearing and Petitioner failed to adequately explain inconsistent statements about understanding the sentence imposed.
2. Counsel was not ineffective for failure to inform Petitioner of the specific intent to kill requirement to be convicted of attempted murder because Counsel credibly testified that he told Petitioner about this requirement and, even if he did not, Petitioner did not adequately show how he was prejudiced by this alleged deficiency because the record reflected he pled because of the weight of the evidence against him, not because of any error on Counsel's part regarding a potential failure to inform him of a specific intent requirement.
3. Counsel was not ineffective for failure to review discovery with Petitioner because Counsel credibly testified they reviewed the discovery together extensively, Petitioner made no showing of what they did not review, and Petitioner did not adequately show he was prejudiced by any deficiency.
4. Counsel was not ineffective for failure to tell Petitioner about the right to appeal because Counsel credibly testified he informed Petitioner of this right and the plea hearing transcript made clear that the court informed him of this option as well. Further, Petitioner made no showing of prejudice for any alleged failure to inform of the right to an appeal.
5. Counsel was not ineffective for failure to file a notice of appeal because Petitioner,

after being informed of his right to appeal, never requested Counsel file a notice of appeal and Counsel credibly testified that he did not think there were any appealable issues in the case.

6. Petitioner knowingly and voluntarily entered his plea.

Petitioner appeals from the denial of relief based upon the allegation that counsel was ineffective for failing to inform Petitioner that the State had to prove he had specific intent to kill concerning the attempted murder charge and, if Counsel had informed Petitioner of this, he would not have pled, but would have proceeded to trial instead. The notice of appeal was filed on February 4, 2020. The petition for writ of certiorari was made on September 17, 2020. This appeal follows.

STATEMENT OF FACTS

On July 14, 2015, both Aquavious Ray and Tyrus Woodruff shot Marlon Davis at least once each while Petitioner was outside, operating as a lookout. (App. 23). After a third shot was fired, Petitioner ran inside two or three times and told Ray and Woodruff to hurry up. (App. 23-25). Petitioner, Ray, and Woodruff robbed three people in the house; Davis, Davis' son, and Akia Ross. (App. 24).

Petitioner called Xavier Martin to pick the three men up. (App. 24). They went to Petitioner's residence, where Petitioner's mother lived. (App. 24). Ross called 911 and told the sheriff's department to track his phone, which was stolen during the robbery. (App. 24). The phone was tracked to the residence where the getaway vehicle that Ross described was also located. (App. 24). The sheriff's department quickly surrounded the residence within the hour. (App. 24). Petitioner's mother gave a statement, stating that all four co-defendants arrived at her house before the Sheriff's Department arrived and no other individuals were there. (App. 25).

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), 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). 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 determined that Petitioner failed to establish counsel was ineffective when Counsel credibly testified he informed Petitioner of the specific intent requirement and Petitioner was not prejudiced by any alleged deficiency.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was deficient for failing to tell Petitioner the State would have to prove beyond a reasonable doubt he had a specific intent to kill to be convicted of attempted murder. Petitioner contends that, but for this deficiency, Petitioner would not have pled but would have proceeded to trial. However, the PCR court properly rejected this argument, finding that Counsel likely informed Petitioner of this requirement and, even if Counsel was deficient, Counsel's advice nor Petitioner's decision to plead would have changed. 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 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. S*ee also* Rule 71.1(e), SCRCP ("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.

In the context of a guilty plea, 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). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *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 applicant 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).

Attempted murder is a specific intent crime, which requires that "the defendant consciously intended the completion of acts comprising the [attempted] offense." *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). "Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact." *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (quoting *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)). "Express malice is the 'deliberate intention unlawfully' to kill a human." *Id.* Further, felony attempted murder is not a recognizable crime in South Carolina, because of how it circumvents the requisite express malice showing. *See State v. Smith*, 430 S.C. 226, 232, 234, 845 S.E.2d 495, 498-99 (2020) (finding that felony attempted murder is not a recognizable crime and an implied malice jury charge is inappropriate when evidence has been presented indicating the defendant acted in self-defense).

Counsel testified that he informed Petitioner of the elements of attempted murder prior to entering the plea. Specifically, at the plea hearing, Counsel testified they spent most of their time together talking about accomplice liability. (App. 29). Counsel testified at the PCR hearing he talked to Petitioner about the elements of attempted murder. (App. 72-73). Additionally, unlike in *Smith*, Petitioner was convicted of an attempted murder charge, not a felony attempted murder charge, and never claimed his actions were in self-defense. Further, there is no indication that

Counsel told Petitioner that he could be convicted of felony attempted murder or otherwise told him he could be convicted of attempted murder because of a proximate direct result arising out of commission of a felony. Thus, Respondent contends that Counsel was not deficient on this ground, given Counsel's credible testimony that he properly informed Petitioner of the elements of attempted murder, including specific intent.

Even if Counsel was deficient, Petitioner was not prejudiced because Petitioner probably would have accepted the plea despite any alleged deficiency on Counsel's part because the weight of the evidence against Petitioner was strong. Petitioner indicated this at the PCR hearing when he stated he pled because his co-defendant likely would have testified against him at trial. (App. 60). Additionally, he testified he thought his co-defendant's testimony would have persuaded the jury that he was guilty. (App. 61).

Counsel confirmed the plea was entered because of the weight of the evidence against Petitioner. Specifically, Counsel stated that Petitioner decided to plead after a co-defendant decided to plead and made clear that he would testify at trial against Petitioner. (App. 71). Counsel stated the co-defendant's decision to plead would have caused incriminating statements from Petitioner to come in at trial, which would have heightened the risk of conviction. (App. 71). Additionally, Counsel testified that Petitioner's incriminating statements to the police have "played a significant role in the state's prosecution" and "that played a significant role in his decision to plead guilty." (App. 30). Counsel stated Petitioner and he discussed this and Petitioner seemingly understood the negative impact of his co-defendant's decision would have at trial. (Tr. 71). Counsel stated that he was worried the State would show at trial that Petitioner fired a shot into the home and that, given the number of people in the home and the potential testimonies of others present at the scene, the jury would find sufficient enough evidence to

convict based upon specific intent. (App. 73). Counsel testified that Solicitor Barnette stated that these facts would be brought out at trial. (App. 73). Consequently, the PCR court correctly found that two of Petitioner's co-defendants' decisions to testify against him if the case went to trial played a major role in Petitioner's decision to plead. (App. 65, 94). Thus, even if Counsel was deficient, Petitioner was not prejudiced, because Petitioner would have still pled guilty with knowledge of the specific intent requirement because of the weight of the evidence against him and the high likelihood of being found guilty at trial. Petitioner cannot meet either prong of the *Strickland* test and, consequently, this Court should affirm the lower court's finding that Petitioner did not have ineffective assistance of counsel.

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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