

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to Aiken County
Court of Common Pleas

The Honorable J. Cordell Maddox, Post-Conviction Relief Judge
The Honorable Benjamin Culbertson, Plea Judge

Appellate Case No. 2017-001247

Gilbert Edward Day,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

STANDARD OF REVIEW5

ARGUMENT.....6

 The post-conviction relief court properly found Petitioner failed to establish
 counsel was constitutionally ineffective for failing to investigate where plea
 counsel interviewed Detective Griffin prior to the plea but had no reason to
 ask Griffin about Petitioner’s wife’s death; where plea counsel attempted to
 respond to Griffin’s statements but was denied by the plea court; and where
 Petitioner was not prejudiced because Counsel’s alleged deficiency did not
 induce the plea, and in any event, the plea court has broad discretion in what
 information it considers in sentencing.....6

CONCLUSION.....10

PETITIONER'S QUESTION PRESENTED

Whether plea counsel provided ineffective assistance of counsel when he failed to interview Detective Griffin to discover that Griffin planned on making irrelevant and prejudicial allegations to the plea court that Petitioner was responsible for his wife's suicide from years of abuse?

RESPONDENT'S QUESTION PRESENTED

Did the plea court correctly find plea counsel was not constitutionally ineffective for failing to investigate where plea counsel interviewed Detective Griffin prior to the plea but had no reason to ask Griffin about Petitioner's wife's death; where plea counsel attempted to respond to Griffin's statements but was denied by the plea court; and where Petitioner was not prejudiced because Counsel's alleged deficiency did not induce the plea, and in any event, the plea court has broad discretion in what information it considers in sentencing?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. In November 2017, the Aiken County Grand Jury indicted Petitioner for second-degree burglary (violent) and grand larceny – \$10,000 or more. The charges arose from an incident occurring on August 14, 2017, when employees at the City of Aiken Engineering and Utilities Building came into work, noticed a side door had been forced open, and found tools and other items missing. Upon review of the surveillance video from inside the building, the employees were able to identify Petitioner, a former employee, as the person on camera. Petitioner stole items with a total estimated value in excess of \$150,000.

Derek Bush, Esquire (Counsel), represented Petitioner on the charges. Assistant Solicitor Michael Bradley McMillian prosecuted the case. On October 19, 2017, Petitioner pleaded guilty before the Honorable Benjamin H. Culbertson. Judge Culbertson sentenced Petitioner to imprisonment for concurrent terms of twelve years for second-degree burglary and ten years for grand larceny. Petitioner did not appeal his guilty plea or his sentence.

On April 30, 2018, Petitioner filed a timely application for post-conviction relief (PCR). The State filed a return on October 29, 2018. An evidentiary hearing on the matter convened on May 15, 2019, at the Aiken County Courthouse before the Honorable J. Cordell Maddox. Arthur K. Aiken, Esquire, represented Petitioner. Assistant Attorney General Jacob A. Isenberg, Esquire, represented the State. In an order of dismissal filed June 27, 2019, Judge Maddox denied relief. Petitioner filed and served a timely notice of appeal of the decision denying relief.

STATEMENT OF THE FACTS

On August 17, 2014, Detective Jason Griffin of the Aiken Department of Public Safety responded to a burglary call at the City of Aiken Utilities and Engineering Building. App. pp. 9-10. Employees reporting to work noticed a side door had been forced open and discovered approximately \$150,000 worth of power tools and equipment were missing from inside. App. p. 10. The employees reviewed the video surveillance footage and identified Petitioner, a former employee who had been out on workers' compensation leave, as the person in the video. App. p. 10.

Griffin and another investigator located Petitioner and spoke to him about this burglary, as well several other burglaries of City of buildings. App. p. 10. Petitioner agreed to cooperate with investigators and ultimately lead them to several places in Aiken and Edgefield Counties to recover items taken during this burglary and others. App. p. 10. Petitioner and the State eventually entered into an immunity agreement for the additional burglaries, and Petitioner helped investigators recover approximately \$272,000 in stolen equipment. App. pp. 11, 88.

Griffin spoke during Petitioner's sentencing and asked the plea court for an active sentence. App. p. 15. Griffin explained \$28,000 worth of the city's equipment had never been recovered, and Petitioner began his burglary spree shortly have his release from prison on a previous burglary charge. App. pp. 15-16. Griffin also stated he had listened to some jail phone calls between Petitioner and Petitioner's wife which indicated Petitioner's wife, at Petitioner's direction, was involved in helping him cover up his involvement in these crimes. App. pp. 15-16. Griffin also stated the phone calls lead him to believe Petitioner's wife was afraid of Petitioner because Petitioner had been abusive in the past, and her suicide was "a direct result of Mr. Day's actions." App. p. 16.

Counsel attempted to respond after Griffin finished speaking, but the judge denied his request. App. pp. 16-17. Counsel noted for the record those calls had not been turned over to the defense, so he and Petitioner had not had an opportunity to review them. App. p. 17. The assistant solicitor then read Petitioner's prior record, which began in 1985 and included two previous burglary convictions in 2008. App. pp. 17-18. The judge inquired what sentence Petitioner received for the burglary charges, and the State responded he was sentenced to a fine of \$125 for one and five years' imprisonment for the other. App. p. 18. The judge then sentenced Petitioner to twelve years for the burglary charge and ten years for the grand larceny charge, to be served concurrently. App. pp. 18-19.

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 defer 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. Id. at 180, 810 S.E.2d at 839. (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. Id. 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

Petitioner asserts the post-conviction relief court erred in denying him relief because Counsel was allegedly constitutionally ineffective for failing to adequately investigate what the lead investigator planned to say at Petitioner's plea hearing. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective. These findings are supported by probative evidence and not premised on an error of law, so 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). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, he must prove "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, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

These 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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. The function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

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. 474 U.S. 52 (1985); 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). 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. 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.

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.

The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to investigate where plea counsel interviewed Detective Griffin prior to the plea but had no reason to ask Griffin about Petitioner's wife's death; where plea counsel attempted to respond to Griffin's statements but was denied by the plea court; and where Petitioner was not prejudiced because Counsel's alleged deficiency did not induce the plea, and in any event, the plea court has broad discretion in what information it considers in sentencing.

Petitioner argues Counsel was constitutionally ineffective because Counsel failed to interview Griffin to ascertain what Griffin was planning to say during the plea hearing. However, Counsel credibly testified he spoke to Griffin prior to the plea about the facts of Petitioner's case, and Counsel had no knowledge of the recorded jail phone calls, so he had no reason to ask Griffin about them. App. pp. 87-88. The PCR court therefore correctly found no deficiency in Counsel's investigation. Moreover, even if Counsel was somehow deficient, the alleged deficiency did not induce his plea because Griffin spoke after Petitioner's colloquy with the plea court, but before the plea court accepted the plea, and Petitioner never moved to withdraw it. Moreover, the plea court has wide latitude in the material it considers during sentencing, and the plea court issued a legal sentence well below the potential maximum aggregate sentence of twenty-five years based on several factors including Petitioner's lengthy previous criminal history. Therefore, Petitioner cannot meet his burden of proving either deficiency or prejudice. Accordingly, this Court should deny certiorari.

Petitioner has framed this issue as Counsel's failure to adequately investigate what Griffin planned to say to the plea court during sentencing. For the purposes of the claim of ineffective assistance, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). However, "[j]ust as there is no expectation that competent counsel will be a flawless

strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” Harrington v. Richter, 562 U.S. 86, 110 (2011). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting Strickland, 466 U.S. at 690-91).

In Petitioner’s case, Counsel credibly testified he had no knowledge any recorded jail phone calls existed,¹ nor did he have any reason to believe Griffin would bring up Petitioner’s wife’s suicide. App. pp. 85, 87-88. Counsel explained he spoke to Griffin, who was the lead investigator on Petitioner’s case, prior to the plea about the facts of the case and the details of the immunity agreement. App. pp. 75-76, 81, 86. Additionally, as Counsel correctly pointed out, even if he had known to ask Griffin about the phone calls, there is no guarantee Griffin would have told Counsel what he planned to say, and Griffin was not required to do so. App. p. 85. Finding Counsel deficient in this situation would be akin to requiring clairvoyance. Cf. Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (explaining an attorney is not required to “be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.”).

¹ The phone calls were not exculpatory, but even if they were, Petitioner knew or should have known of their existence because he was a participant in them, and therefore, the State was not required to turn them over to the defense prior to the plea. See United States v. Ruiz, 536 U.S. 622, 628-29 (2002) (holding the Constitution does not require the government to disclose impeachment information prior to entering a plea agreement because impeachment information is related to the right to a fair trial, which a defendant waives upon entering a plea agreement, rather than the voluntariness of the plea); United States v. Frank, 11 F.Supp.2d 322, 327 (S.D.N.Y. 1988) (“Evidence, even if exculpatory and material, is not required to be disclosed, however, if the defendant knows or should have known of ‘the essential facts permitting him to take advantage of any exculpatory evidence. . . .’ The Government is required, however, to disclose sufficient information to the defendant to insure that the defendant will not be denied access to exculpatory evidence *known only to the Government*.”) (quoting United States v. Zackson, 6 F.3d 911, 918 (2d Cir. 1993)) (emphasis added).

Accordingly, the PCR court correctly found Counsel was not deficient in his investigation, and this Court should deny certiorari. App. p. 98.

Importantly, Petitioner has also failed to prove Counsel's allegedly deficient investigation induced his plea. Petitioner's claim must fail as a matter of law because he has failed to establish that his plea was induced by counsel's alleged error, and he would not have pleaded guilty but for counsel's performance. See Hill, 474 U.S. at 59 (“[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”); Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018) (“In order to establish prejudice when challenging a guilty plea, a defendant must prove there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have gone to trial. The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.”) (internal citations and quotations omitted).

Here, although Petitioner testified he would not have pleaded guilty had he known what Griffin was going to say, the transcript of the plea hearing shows the opposite to be true. When Griffin spoke as part of the State's presentation, the plea court had not yet accepted the plea. App. pp. 16, 18. The State continued its presentation by reciting Petitioner's criminal record, and the plea court inquired as to the sentences Petitioner received for his two previous burglary convictions. Only after that did the plea judge accept the plea and find Petitioner had entered into it knowingly and voluntarily. App. pp. 17-18. After accepting the plea, he then pronounced his sentence. App. pp. 18-19. During this time, Petitioner could have asked the court to stand down and request it not to accept the plea, but Petitioner did not do so. Therefore, Petitioner was not

prejudiced because even *after* he heard Griffin's comments, he still continued with the entry of his guilty plea, and therefore, he was not prejudiced by any alleged error of counsel. Accordingly, this Court should deny certiorari.

Additionally, a judge generally has broad discretion in determining what sentence to impose within statutory limits. Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). Moreover, "a judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant." State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). "A court may consider any relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided the information has sufficient indicia of reliability to support its probable accuracy." State v. Gullede, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997).

Here, Petitioner contends Griffin told the plea court "Petitioner was responsible for Petitioner's wife's suicide because [Petitioner] was 'abusive to her for several years.'" PWC p. 7. However, what Griffin told the plea court was more nuanced than that. Griffin certainly stated Petitioner was responsible for his wife's suicide and indicated the wife was afraid of Petitioner because Petitioner had been abusive and threatening to her in the past, and importantly, that he was doing so again *in connection with these charges* – attempting to coerce her into hiding evidence and directly involving her in this case. App. p. 15. Griffin informed the plea court he believed "Petitioner's actions" caused the wife to commit suicide, but an equally plausible reading of Griffin's statement is that the "actions" he refers to are Petitioner's actions involving his wife in hiding evidence and obstructing the investigation of this case. App. p. 16.

Petitioner's attempt to coerce a witness into covering for him is relevant to both Petitioner's guilt and punishment. Notably, Petitioner has never asserted Griffin misrepresented the content

of the phone calls; Petitioner's only assertion is that he would not have pleaded guilty had he known Griffin was going to bring them up to the plea court.² App. p. 50. However, because Petitioner's actions after his arrest and the effect those actions had on a potential witness in the case against him is relevant to sentencing, Griffin's statement to the judge was within the broad universe of relevant information for the plea judge to consider in sentencing.

Petitioner's significant and lengthy criminal history is also relevant, and the record reveals the plea judge asked several questions clarifying Petitioner's prior record, particularly his two previous burglary convictions, for which he received significantly more lenient sentences. App. pp. 17-18. Petitioner had also been recently released from prison when he was arrested on these charges and admitted his involvement in numerous other burglaries. App. p. 15.

Accordingly, because Petitioner cannot prove he was prejudiced by Griffin's statements to the plea judge, and this Court should deny certiorari.

² Additionally, the recordings were not entered into evidence at the PCR hearing. App. p. 42.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not constitutionally ineffective. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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