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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

The Honorable J. Cordell Maddox, Post-Conviction Relief Judge
The Honorable R. Lawton McIntosh, Plea Judge

Appellate Case No. 2019-001183

Jalen T. Badger,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE PRESENTED

The PCR judge erred in denying petitioner's allegation that he pled guilty involuntarily where petitioner claimed he was coerced into pleading guilty to avoid a possible mandatory LWOP sentence because counsel failed to explain to petitioner, who was sixteen years old when he plead guilty, the law on LWOP sentencing for juveniles.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to adequately explain the potential sentence Petitioner faced, where Petitioner faced a de facto life sentence if he rejected the plea bargain given the solicitor's expressed intent to try Petitioner's charges separately, and where Petitioner never testified he would have gone to trial had Counsel properly explained the potential sentence, and therefore, Petitioner cannot prove prejudice because it is not reasonably likely he would have rejected the plea offer in favor of trial, even if Counsel had given the correct sentencing advice.

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. During its September 2016 term, the Aiken County Grand Jury indicted Petitioner for two counts of first-degree burglary (2016-GS-02-01895, -01892), carjacking (2016-GS-02-01886), armed robbery (2016-GS-02-01885), first-degree assault and battery (2016-GS-02-01888), and possession of a firearm during the commission of a violent crime (2016-GS-02-01887).¹ David Hayes, Esquire (Counsel), represented Petitioner on the charges. Assistant Solicitor Robert Wilder Harte of the Second Circuit Solicitor's Office prosecuted the case. On November 14, 2016, Petitioner appeared before the Honorable R. Lawton McIntosh and pleaded guilty as indicted to both counts of first-degree burglary, carjacking, and armed robbery. Judge McIntosh sentenced Petitioner to imprisonment for concurrent terms of seventeen years on each charge pursuant to a negotiated sentencing agreement between Petitioner and the State.

Petitioner filed a timely notice of appeal. On January 27, 2017, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules. The remittitur issued on February 16, 2017.

¹ It is not clear from the transcript of the plea hearing, but the public index reflects the charges for first-degree assault and battery and possession of a weapon were dismissed in exchange for Petitioner's guilty plea. See Aiken County Public Index.

Assault and battery:

<https://publicindex.sccourts.org/Aiken/PublicIndex/CaseDetails.aspx?County=02&CourtAgency=02001&Casenum=2016A0210200765&CaseType=C&HKey=651215674577310811612212110312211312190837275685597115665776102881099752114107725112083108788410710810852>

Possession of a weapon:

<https://publicindex.sccourts.org/Aiken/PublicIndex/CaseDetails.aspx?County=02&CourtAgency=02001&Casenum=2016A0210200763&CaseType=C&HKey=105788083535247667875705651851105267751176882658410882547610473108695210710066891185771537110889>

On October 30, 2017, Petitioner filed a timely application for post-conviction relief (PCR). The State filed a return on July 6, 2018. An evidentiary hearing on the matter convened on May 14, 2019, at the Aiken County Courthouse before the Honorable J. Cordell Maddox. Arthur K. Aiken, Esquire, represented Petitioner. In an order of dismissal filed June 17, 2019, Judge Maddox denied relief. Petitioner filed and served a timely notice of appeal of the decision denying relief.

STATEMENT OF THE FACTS

First-Degree Burglaries

On March 29, 2016, officers responded to a home on Stone Pass Drive in Graniteville. App. p. 11. When the homeowner returned from work, he discovered the back door to his house was open, and the doorframe had been kicked in and shattered. App. p. 11. Footprints were visible in the backyard; however, investigators were unable to locate any fingerprint or DNA evidence at the scene. App. pp. 11-12. The homeowner reported numerous items had been taken, including a electronics, 40-caliber Taurus firearm, and a .22 LR short-barreled revolver. App. pp. 11, 58.

On April 14, 2016, officers responded to another home on Stone Pass Drive where, again, forced entry was made through the back door. App. p. 12. The homeowner reported numerous items had been taken including cash and a 20-gauge shotgun. App. pp. 12, 58. As before, no fingerprints or DNA were found at the scene, and the investigation stalled. App. p. 12.

At least one burglary, the first, was partially captured by a neighbor's video surveillance system, which helped investigators identify Petitioner as a potential person of interest. App. p. 58. Petitioner was eventually connected to both burglaries because he was wearing a GPS ankle monitor as a condition of his Department of Juvenile Justice probation. App. pp. 13, 58-59. The GPS physical location data showed Petitioner inside both residences at the time the burglaries occurred. App. pp. 13, 59.

Carjacking and Armed Robbery

On May 3, 2016, officers again responded to the Sage Creek subdivision, this time for a report of an assault and potential armed robbery. App. p. 12. Upon arrival, officers spoke with two callers who stated they heard screaming outside, and a ten-year-old boy witnessed a woman being dragged out of a red Toyota Corolla. App. p. 13. The boy told his mother what he had seen,

and they got in their car and drove around the neighborhood. App. p. 13. They eventually located the red Toyota abandoned at the back of the neighborhood and found Megan Williams (Williams) nearby. App. pp. 13, 58. Williams had a laceration on her head and suffered a “pretty serious beating.” App. p. 13. Another witness separately called 911 and reported she had seen a man with a gun in his hand assaulting Williams in the street. App. p. 13. This incident was also captured on surveillance video. App. p. 58.

Investigators learned, prior to the carjacking and assault, Williams sent Facebook messages and texts to Petitioner’s older brother to sell him and Petitioner some marijuana. App. p. 14. During the transaction, Petitioner was armed with a gun and put it to the back of William’s head and said, “Drive or I’ll kill you.” App. p. 14. Williams attempted to escape, and Petitioner pistol whipped her numerous times in the street before she returned to the car. App. p. 14. Petitioner’s brother then held Williams held in the car by her hair, as Petitioner drove away. App. p. 14. Petitioner and his brother continued to assault Williams before walking back to their home on Red Rock Way. App. p. 15.

Williams identified Petitioner’s brother from a photo line-up without hesitation, and she told investigators she was “70% sure” of her identification of Petitioner as the suspect with the gun. App. p. 15. Officers recovered a fingerprint from both Petitioner and his brother inside Williams’ car. App. p. 15. Petitioner was still wearing the GPS monitor during this incident, and it confirmed he was at the location of the carjacking and assault at the time it occurred. App. p. 13.

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 explain the potential sentence Petitioner faced. 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 because Petitioner has not proven Counsel's alleged deficiency induced the guilty plea. 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 v. Kentucky, 559 U.S. 356, 373 (2010) (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 v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to adequately explain the potential sentence Petitioner faced, where Petitioner faced a *de facto* life sentence if he rejected the plea bargain given the solicitor’s expressed intent to try Petitioner’s charges separately, and where Petitioner never testified he would have gone to trial had Counsel properly explained the potential sentence, and therefore, Petitioner cannot prove prejudice because it is not reasonably likely he would have rejected the plea offer in favor of trial, even if Counsel had given the correct sentencing advice.

Petitioner argues Counsel was constitutionally ineffective because Counsel failed to adequately explain the potential sentence Petitioner faced, leading Petitioner to believe he could receive a sentence of life without parole (LWOP) even though Petitioner was a juvenile and charged with only nonhomicide crimes. Respondent concedes to the extent Counsel advised Petitioner he could be sentenced to life without parole for any of these offenses – which Counsel clearly did – Counsel’s advice was deficient. See Graham v. Florida, 560 U.S. 48, 82 (2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”). However, Counsel also credibly testified he explained to Petitioner how Petitioner could end up in a situation in which he received consecutive sentences which combined to a *de facto* life sentence due to the solicitor’s expressed intent to try the cases separately should Petitioner reject the plea bargain. App. pp. 61-62. Counsel’s advice in that respect was correct. See State v. Slocumb, 426 S.C. 297, 314-15, 827 S.E.2d 148, 157 (2019) (holding “[n]either Graham nor the Eighth Amendment, as interpreted by the [United States] Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender.”)

Moreover, Petitioner never testified he would have rejected the plea offer had Counsel advised him he could not receive a life without parole sentence, and given the strength of the State's evidence against Petitioner on all of the charges and Petitioner's previous record, Petitioner was not prejudiced because it is not reasonably likely the deficiency induced Petitioner's plea. Therefore, the PCR court correctly denied relief, and this Court should deny certiorari.

Petitioner argues Counsel was constitutionally ineffective for failing to adequately explain the potential sentence Petitioner faced as a juvenile defendant, where a sentence of life without parole could not be imposed upon him for a nonhomicide crime.² However, because the four charges to which Petitioner pleaded guilty arose out of three separate incidents, Petitioner was subject to at least two trials – one for the burglaries and one for the carjacking and assault – on a total of six charges if Petitioner had chosen to reject the State's plea offer. App. pp. 10, 61. Because of this, Counsel explained his concern Petitioner would receive an aggregate sentence which would have the same effect as a sentence of life without parole. App. pp. 59-61. Counsel further

² Petitioner's argument at the evidentiary hearing and on appeal misapprehends the holdings of Miller v. Alabama, 567 U.S. 460 (2012), and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The prohibition of mandatory life without parole for juvenile offenders and the requirement a juvenile defendant have an opportunity for mitigation prior to the imposition of such a sentence as envisioned by Aiken applies only to juvenile *homicide* offenders. See Miller, 567 U.S. at 470 (holding the mandatory imposition of sentences of life without possibility of parole on juvenile homicide offenders constituted cruel and unusual punishment prohibited by the Eighth Amendment); Aiken, 410 S.C. at 545, 765 S.E.2d at 578 (extending Miller's holding to nonmandatory LWOP sentences for juvenile homicide offenders and requiring a sentencing court to "fully explore the impact of the defendant's juvenility..." prior to imposing a sentence of LWOP). However, the United States Supreme Court's holding in Graham categorically prohibits the imposition of a life sentence for juvenile *nonhomicide* offenders, and thus, Petitioner was never subject to a sentence of life without parole on these charges even if tried separately for each incident. 560 U.S. at 82. Counsel was appropriately concerned, however, with the possibility of a *de facto* life sentence, which is not prohibited and which does not require any special consideration of juvenility. See Slocumb, 426 S.C. at 314-15, 827 S.E.2d at 157 ("Neither Graham nor the Eighth Amendment, as interpreted by the [United States] Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender.")

explained Petitioner did not have any viable defenses to either set of charges given the video surveillance, the GPS data, and the eyewitnesses. App. pp. 13, 59. Had Petitioner not accepted the guilty plea, he was subject to a minimum sentence of forty years of violent time just on the four charges to which he pleaded guilty, and because the burglary charges carry up to a life sentence for an adult offender, there would have been no way for Counsel to predict a potential maximum sentence – only that Petitioner would be subject to some indeterminate term of years, potentially exceeding his natural life expectancy. See Slocumb, 426 S.C. at 314-15, 827 S.E.2d at 157 (finding the aggregate sentence of one-hundred-thirty years imposed on Slocumb, a juvenile nonhomicide offender, did not “categorically violate[] the Eighth Amendment pursuant to the reach of Graham”).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his [or her] guilty plea was induced by ineffective assistance of counsel must prove counsel’s advice was not “within the competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56. Further, “[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant’s lawyer withstand retrospective examination in a post-conviction hearing.” McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” Id. at 771.

In this case, the record is clear Petitioner knew he faced the possibility of a life sentence, even if he was not certain of the procedure by which that might happen. App. p. 53. Crucially, Petitioner never testified he would not have pleaded guilty had he known he was “only” subject to a *de facto* life sentence, rather than a *de jure* life sentence. App. pp. 47-56. 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.”). Moreover, it is not rational to believe Petitioner would risk a *de facto* life sentence up to three times – on each of the two first-degree burglary charges and then again through an aggregate sentence on the armed robbery and carjacking case – given the strength of the State’s evidence against him and his prior record. See Lee, 582 U.S. ____, 137 S. Ct. at 1965 (denying relief for lack of prejudice where Lee failed to make “an adequate showing that [he], properly advised, would have opted to go to trial.”); Padilla, 559 U.S. at 372 (“[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances”). Petitioner was connected to both the burglaries and the carjacking by GPS monitoring and video surveillance, and there were multiple independent eyewitnesses to the carjacking, in addition to the victim. App. pp. 12-14, 58-59. At the time of all of these crimes, Petitioner was on GPS monitoring through the Department of Juvenile Justice after violating his probation for previous convictions for strong-arm robbery and third-degree burglary. App. pp. 13-14, 16-17.

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his 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. However, “[i]t is also 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). When Petitioner’s mother spoke at his plea hearing, she explained “from [her] point of view, [Petitioner]’s taking the plea because of the other charges,” and that doing so was “common sense.”³ App. p. 22. Petitioner himself admitted his motivation in pleading guilty was “because if [he] didn’t take the plea, [he’d] be looking at life” and he did not want to “catch life.” App. p. 53. Based on this testimony, it is clear Petitioner has failed to meet his burden regarding prejudice on this issue—that with the correct advice he would have pleaded guilty rather than proceeding to trial. Cf. Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009) (holding a PCR applicant must prove actual prejudice regarding an allegation counsel’s deficient performance caused him to reject a favorable plea bargain), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Accordingly, because Petitioner cannot prove prejudice, this Court should deny certiorari.

³ Petitioner was only noticed for trial on the armed robbery/carjacking charges, not for the burglaries, in accordance with the State’s strategy to try him in two separate proceedings. However, the State ultimately agreed to resolve both cases with a single guilty plea. App. p. 16.

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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