

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to Richland County
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Derham Cole, Jr., Post-Conviction Relief Judge
The Honorable Robert E. Hood, Plea Judge

Appellate Case No. 2017-001738

Faasiu Toese,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General
SC Bar #79054

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

STANDARD OF REVIEW6

ARGUMENT.....7

 The post-conviction relief court properly found Petitioner failed to establish
 counsel was constitutionally ineffective for failing to retain the services of
 a Samoan interpreter where the record reflects Petitioner spoke and
 understood sufficient English to communicate with his attorney and the plea
 court, and Counsel testified she did not have any issues communicating with
 Petitioner due to a language barrier.....9

CONCLUSION.....14

PETITIONER’S ISSUE PRESENTED

Did the PCR court err in finding counsel was not ineffective for failing to secure an interpreter for Samoan, non-native English-speaking petitioner at their meetings or at petitioner’s guilty plea, where counsel admitted petitioner had trouble understanding legal concepts?

RESPONDENT’S COUNTERSTATEMENT OF ISSUE PRESENTED

Did the plea court correctly find plea counsel was not constitutionally ineffective for failing to retain the services of a Samoan interpreter where the record reflects Petitioner spoke and understood sufficient English to communicate with his attorney and the plea court, and Counsel testified she did not have any issues communicating with Petitioner due to a language barrier?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. In April 2013, the Richland County Grand Jury indicted Petitioner for one count of murder (2013-GS-40-02761). Jennifer C. Davis, Esquire (Counsel), represented Petitioner. Petitioner pleaded guilty as indicted on March 18, 2015, and pursuant to a negotiated agreement between Petitioner and the State, the Honorable Robert E. Hood sentenced him to thirty-six years' imprisonment.

A notice of appeal was filed on Petitioner's behalf on March 20, 2015. The South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation on May 29, 2015 and denied rehearing on February 5, 2016. The remittitur returned to the circuit court on April 26, 2016.

On November 25, 2015, Petitioner filed a timely application for post-conviction relief (PCR). The State filed a return on April 27, 2016. An evidentiary hearing into the matter convened April 1, 2019, at the Richland County Courthouse before the Honorable J. Derham Cole, Jr. Jonathan D. Waller, Esquire, represented Petitioner. In an order of dismissal filed October 8, 2019, Judge Cole denied relief. Petitioner filed and served a timely notice of appeal of the decision denying relief.

STATEMENT OF THE FACTS

Around 2:30 a.m. on January 2, 2013, officers responded to a McDonald's parking lot after Petitioner called 911 to report that his girlfriend, Temukisa Enele (Kesa), had cut herself with a knife and needed an ambulance. App. p. 10. When the dispatcher asked where Kesa had been cut, Petitioner responded, "Well, like all over, I guess, the face and neck." Petitioner was evasive when the dispatcher asked how long ago the injury occurred, stating, "I'm not really sure. I just panicked when the thing happened. . . . She didn't move at all. She just laid down. At that point, I grabbed her and tried to wake her up, but she just laid down." App. p. 11.

When officers arrived on the scene and asked Petitioner where the injured person was, Petitioner opened the back of his vehicle, and officers found Kesa stuffed inside a plastic container, with another covering her. App. p. 11. Petitioner was immediately arrested and Mirandized and admitted the incident had actually taken place at his and Kesa's home, not in the car or at the McDonald's. App. pp. 11-12. EMS arrived and confirmed Kesa was unresponsive, cold to the touch, and had blood on her face and neck. App. p. 12. After Kesa's body was removed from the container, investigators noticed numerous stab wounds, including several defensive wounds to her hands and forearms, as well as the presence of vomit in her hair. App. pp. 12-13.

Petitioner gave a statement to police and claimed he and Kesa got into an argument earlier that day when he accused her of having an affair with one of their co-workers, a man named Greg Miller. App. p. 14. Petitioner alleged Kesa pushed him and hit him in the face, eye, and chest, although investigators did not find any corresponding injuries on Petitioner. Petitioner claimed he tried to hug Kesa and apologize, but she would not stop hitting him, so in an attempt to get her off of him, he hit her on the cheek with his wrist, which officers noticed was swollen. App. pp. 14-15. Petitioner then claimed Kesa grabbed a knife, which he thought she was going to use on herself,

so he tried to take it from her. App. p. 15. Petitioner stated Kesa hit him again in an attempt to get the knife back, and he lost control and stabbed her four times before he blacked out.¹ App. p. 15.

Petitioner stated when he came to, he realized he needed to get help. However, Petitioner couldn't carry Kesa as she was, so he put her in the container so he could lift her into his car and put the second container on top to keep her from getting wet. App. pp. 15-16. Petitioner then drove off and texted Greg – the same Greg he had accused Kesa of having an affair with – for help finding a hospital. App. p. 16. When Greg did not answer, Petitioner called him, but Greg did not answer the phone call either. App. p. 16. By this time, Petitioner had driven several miles from his home to the Wal-Mart on Harbison Boulevard, so he pulled into the parking lot to figure out what to do next. App. p. 16. Petitioner stated he then drove to the McDonald's, where he finally realized he should call 911.² App. pp. 16-17.

When investigators went to Petitioner's apartment, they immediately noticed signs of an attempted clean up, including a strong odor of bleach, puddles of clear liquid on the floor, a knife wrapped in bubble wrap, and bloody cloths stashed in another plastic bin. App. pp. 18-19. Petitioner stated he tried to clean up because did not want the house to smell like blood. App. p. 18. Investigators also noted signs of a struggle throughout the apartment including what was eventually determined to be Kesa's blood on the bedroom and bathroom walls. App. pp. 18-19.

¹ Kesa was actually stabbed fifteen times. App. pp. 15, 20.

² When police asked why he did not call 911 sooner, Petitioner claimed he was rushing to the hospital and did not have a working phone, despite having two working cell phones with him upon arrest from which he called both Greg Miller and 911. App. pp. 17-18. Petitioner later claimed he did not call 911 from the house because he wanted to get Kesa into the car before he called. App. p. 18.

The medical examiner determined Kesa suffered blunt force trauma to the back and side of her head, as well as several fatal stab wounds to the neck. App. p. 20. In all, Petitioner stabbed Kesa fifteen times, severing her carotid artery. App. p. 20.

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 secure a Samoan interpreter for use during their meetings and 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.

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.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him.

Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). 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. 29, 34, 528 S.E.2d 418, 421 (2000) (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." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harres, 282 S.C. at 133, 318 S.E.2d at 361. However, statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985).

The post-conviction relief court properly found Petitioner failed to establish counsel was constitutionally ineffective for failing to retain the services of a Samoan interpreter where the record reflects Petitioner spoke and understood sufficient English to communicate with his attorney and the plea court, and Counsel testified she did not have any issues communicating with Petitioner due to a language barrier.

Petitioner argues Counsel was constitutionally ineffective because Counsel failed to secure a Samoan interpreter for use during their meetings and at Petitioner's plea hearing. However, although Petitioner contends he "was unfamiliar with the American legal system" and "did not understand enough English to comprehend the crime he was charged with, his legal options, or the rights he waived by pleading guilty" the record reflects Petitioner spoke sufficient English to engage in an intelligent and coherent colloquy with the plea court and give appropriate responses

to the court's questions. PWC p. 7; App. pp. 3-21. Additionally, Counsel testified she did not have any communication issues with Petitioner due to a language barrier, she believed he understood their conversations, and Petitioner asked relevant questions during their meetings and discussions leading up to the entry of the guilty plea. App. pp. 92-96, 100. Moreover, at both the plea hearing and the PCR evidentiary, when given the opportunity to address the court on his own, Petitioner did so in English.³ App. pp. 38, 62-66. Because the record is clear Petitioner spoke and understood sufficient English to knowingly and voluntarily enter his guilty plea, the PCR court correctly denied relief, and this Court should likewise deny certiorari.

At the plea hearing, Petitioner informed the court he was not under influence of any substance which would affect his ability to understand what he was doing, and he told the court he had taken his medication as prescribed. App. pp. 3-4. Despite Petitioner's testimony at the evidentiary hearing that he did not tell the plea court he needed an interpreter because he did know he could do so, the plea court specifically inquired whether Petitioner had understood his conversations with his attorney and what was happening in court that day, and Petitioner stated he did. App. p. 4. The plea court thoroughly explained Petitioner's constitutional rights including his right to remain silent, to have a jury trial, to confront witnesses and present a defense, and the State's burden of proof beyond a reasonable doubt. App. pp. 6-7. Each time, Petitioner indicated he understood those rights and wished to give them up in order to plead guilty. App. pp. 6-7. The plea court then explained the negotiation and clearly informed Petitioner that if the court accepted the guilty plea, the only possible sentence Petitioner could receive was thirty-six years, and Petitioner again indicated he understood. App. pp. 7-8. Petitioner then affirmed he and Counsel

³ Although no interpreter was present at the plea hearing, PCR counsel retained the services of an interpreter for the PCR evidentiary hearing. Therefore, even when an interpreter was present, Petitioner did not consistently avail himself of assistance. App. pp. 57-62, 62-66.

had “fully discussed” the charges, and he was satisfied with her representation. App. pp. 8-9. Tellingly, when Petitioner took the opportunity to speak to the plea court, he never indicated he did not understand the proceedings or needed an interpreter. Instead, Petitioner said he “want[ed] to apologize” and took responsibility for the crime, telling the plea court, “I know I’m responsible for this.” App. p. 38. Throughout the plea, Petitioner demonstrated an ability to respond intelligently to the plea court’s inquiries and gave appropriate responses to all of the court’s questions,⁴ and Petitioner never testified at the evidentiary hearing that he would not have pleaded guilty had he been provided the services of an interpreter.

Additionally, Counsel testified at the evidentiary hearing she did not have any problems communicating with Petitioner about his case or the legal options he had for resolving it. Although Counsel testified Petitioner sometimes indicated he did not understand a particular legal term or concept, he never asked her for an interpreter, and he was able to communicate his version of the facts and help her prepare the case. App. pp. 92-96. Counsel testified she and Petitioner discussed the possible defenses of accident and self-defense, and Petitioner understood those conversations enough to ask relevant questions. App. pp. 95-96. Counsel explained she felt Petitioner had some mental health issues and had him evaluated for competency,⁵ but she did not question his ability to understand conversations about the legal aspects of his case. App. pp. 95-96, 100. For example, when discussing whether to accept the plea agreement, Petitioner asked her questions about his right to appeal, both before and after the plea. App. pp. 99-100.

⁴ At the evidentiary hearing, Petitioner again spoke to the court, in English, without the aid of an interpreter, and engaged in a lengthy conversation with the PCR judge about his request for a continuance. App. pp. 62-66.

⁵ Petitioner was evaluated and found to be competent to stand trial. App. p. 3. Counsel testified the mental health concerns did not affect her communication with him. App. p. 103. By the time of the plea hearing, Petitioner was taking medication and told the plea court he had taken it that day as prescribed. App. p. 4.

Counsel also testified she discussed Petitioner's options for proceeding to trial or entering a guilty plea, and when she conveyed the initial plea offer of forty years, Petitioner asked her to make a counteroffer. App. p. 98. Counsel stated she eventually negotiated a thirty-six year sentence and explained to Petitioner what that meant, and she believed he understood their conversation. App. p. 98. Counsel testified it was Petitioner's decision to enter the plea, and she believed he understood what he was doing. App. p. 98-100. She stated he never asked for an interpreter on the day of the plea, never stopped to ask her questions or indicate he did not understand something that was happening during the plea, and in her opinion, he was able to respond appropriately to the plea court's colloquy. App. p. 99. Counsel testified if she thought Petitioner had issues with understanding English, she would have tried to find an interpreter, but she never did because, based on her interactions with him, he understood what was going on without the help of an interpreter. App. p. 99.

Accordingly, for all of the above reasons, the PCR court correctly found plea counsel was not deficient in her representation of Petitioner, and Petitioner entered his guilty plea freely and voluntarily. App. p. 122. Moreover, Petitioner offered no testimony as to how the lack of interpreter prejudiced him – he did not testify he would not have entered the plea had an interpreter been provided and the record reflects the plea court asked detailed and thorough questions of Petitioner to ascertain whether he was entering the plea freely and voluntarily before accepting the plea. App. pp. 3-21. See State v. Lopez, 352 S.C. 373, 379, 574 S.E.2d 210, 213 (Ct. App. 2002) (“[T]he record contains substantial evidence that Lopez consistently rejected the Circuit Court's offers to provide the services of a translator.... Furthermore, Lopez fails to explain how a comparative knowledge of the legal rights available to him under the legal systems of the United

States and Mexico would have affected his decision to plead guilty. Thus, we find no prejudice to Lopez resulting from any error made by the Circuit Court in accepting his guilty plea.”).

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,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General

BY: s/ Lindsey A. McCallister
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

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