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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to Richland County
Court of Common Pleas

The Honorable Jocelyn Newman, Post-Conviction Relief Judge
The Honorable Tonya Gee, Plea Judge

Appellate Case No. 2019-002075

Shiquan Tyon Cwiklinski,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Did the PCR court err in refusing to find counsel ineffective for failing to move for a motion to reconsider sentence?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

Did the PCR court correctly find plea counsel was not constitutionally ineffective for filing a notice of appeal, as requested by Petitioner, rather than a motion to reconsider the sentence, when the plea judge clearly indicated the reasons for the sentence on the record, and it was not reasonably likely she would change her mind?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. In July 2013, the Richland County Grand Jury indicted Petitioner for two counts of attempted murder (2013-GS-40-4043, -4044) and one count of possession of a weapon during the commission of a violent crime (2013-GS-40-4045). Anastasia L. Walker, Esquire (Counsel), represented Petitioner. Assistant Solicitors Dolly J. Garfield and Joseph Shenkar prosecuted the case. On October 15, 2015, Petitioner pleaded guilty as indicted to possession of a weapon during the commission of a violent crime and to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) on both counts of attempted murder before the Honorable Tanya A. Gee. Judge Gee sentenced Petitioner to twenty years' imprisonment for each count of ABHAN and five years for possession of a weapon during the commission of a violent crime, all to be served concurrently.

Petitioner filed a timely notice of appeal on October 21, 2015.[1] The South Carolina Court of Appeals dismissed Petitioner's appeal on March 29, 2016, for failing to comply with the requirements of Rule 203(d)(1)(B)(iv), SCACR, which requires a preliminary showing of potentially meritorious issues for an appeal from a guilty plea. State v. Cwiklinski, No. 2015-002185 (S.C. Ct. App. filed March 29, 2016). The remittitur returned to the circuit court on April 20, 2016.

On March 16, 2017, Petitioner filed a timely application for post-conviction relief (PCR). Respondent filed a return on September 14, 2017. An evidentiary hearing into the matter convened December 3, 2018, at the Richland County Courthouse before the Honorable Jocelyn Newman. Dayne C. Phillips, Esquire, represented Petitioner. In an order of dismissal filed May 22, 2019, Judge Newman denied relief. Petitioner filed a motion to alter or amend the judgment pursuant to

[1] The notice of appeal says it was filed on October 21, 2014, which appears to be a scrivener's error.

Rule 59(e), SCRCP, which Judge Newman denied by written order filed December 13, 2019. Petitioner then filed a timely notice of appeal of both decisions.

STATEMENT OF THE FACTS

On February 23, 2013, around 2 a.m., Investigator Emmitt Gilliam of the Columbia Police Department was patrolling on foot in the Five Points neighborhood. App. p. 7. Investigator Gilliam was on Greene Street when he noticed a large group of people run out of a bar called the Library, around the corner on Harden Street. App. pp. 7-8. Gilliam attempted to stop members of the group from leaving and approached a man named Kendale Pollock to ask what happened. App. p. 8. Pollock began loudly cussing at Gilliam and ignored Gilliam's request to calm down and explain what was going on, so Gilliam started to place Pollock under arrest for disorderly conduct. App. p. 8.

In the meantime, Petitioner ran to his car parked in the Andy's Deli parking lot off of Greene Street, retrieved a gun, and fired at Gilliam and Pollock seven times. App. pp. 8-9. Upon hearing the gunshots, Gilliam put Pollock into protective custody and walked him to the paddy wagon. App. p. 9. Petitioner discarded the gun and walked up to Gilliam – who did not realize at the time that Petitioner was the shooter – and asked Gilliam to release Pollock, who was Petitioner's friend. App. p. 9. Petitioner then gave Gilliam his contact information. App. p. 9.

Investigator Christian Ross responded to the scene and spoke to residents of an apartment building near Andy's Deli, who pointed investigators to a specific car in the parking lot. App. p. 9. When investigators ran the tags, they discovered the car was registered to Petitioner's mother. App. p. 9. Ross then contacted the man in charge of security footage in Five Points and obtained video of the shooting.[2] App. p. 9. When Gilliam watched the video, he realized the shooter was the same man who approached and gave his contact information as Gilliam was putting Pollock into custody. App. pp. 9-10.

[2] The State played the video for Judge Gee at the plea hearing.

When investigators arrested Petitioner the next day, he was wearing the same clothing from the previous night. App. p. 10. He waived his Miranda rights and agreed to speak with detectives and initially denied any involvement in the shooting. App. p .10. After investigators showed him the video, Petitioner admitted to being the shooter, but claimed he only shot into the air because he had just been jumped at the Library. App. pp. 10-11. Petitioner claimed to have thrown the gun in the Broad River. App. p. 10.

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 move the plea court to reconsider his sentence instead of filing a notice of appeal, as Petitioner requested. 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.

The post-conviction relief court properly found Petitioner failed to establish Counsel was constitutionally ineffective for filing a notice of appeal, as requested by Petitioner, rather than a motion to reconsider the sentence, when the plea judge clearly indicated the reasons for the sentence on the record, and it was not reasonably likely she would change her mind.

Petitioner argues Counsel was constitutionally ineffective because Counsel failed to file a notice of appeal, as requested by Petitioner, rather than a motion to reconsider the sentence. However, the PCR court found Petitioner never requested Counsel file such a motion, and instead requested Counsel file an appeal, which Counsel did. Moreover, even if Petitioner *had* requested Counsel file a motion to reconsider the sentence, Counsel is not required to do so. In sentencing Petitioner, the plea judge clearly indicated her reasoning, and Petitioner presented no evidence or testimony as to what Counsel could have presented or argued to cause the plea judge to change her mind. Because Petitioner failed to meet his burden of proof as to either prejudice or deficiency, the PCR correctly denied relief, and this Court should deny certiorari.

Prior to sentencing, Counsel gave a robust presentation in support of mitigation of Petitioner's sentence. App. pp. 20-25. Counsel explained Petitioner had an alcohol dependency, that he started drinking when he was fourteen years old, and he was under the influence on the night of the shooting. App. p. 20. In addition, one of the victims, Pollock, actually spoke in support of Petitioner. App. pp. 23-24. Finally, Petitioner had numerous friends and family members present at the hearing, and Counsel presented the plea judge with approximately twenty letters from them and other community members on Petitioner's behalf. App. pp. 21-22. The plea

judge acknowledged the time put into writing the letters and paused the proceedings in order to read them. App. p. 25.

When the hearing resumed, the plea judge clearly explained her rationale in sentencing Petitioner to twenty years. She stated she "believe[d] in justice tempered with mercy," and noted Petitioner was pleading to the lesser-included charge of ABHAN, rather than two counts of attempted murder. App. p. 28. Moreover, she described her reaction to the video of the shooting, calling Petitioner's actions "certainly stupid," "incredibly dangerous," and "scary." App. p. 27. She pointed out Petitioner fired seven times into a crowd and stated he brought the "wild, wild West" or the "most dangerous streets of Chicago" to Columbia. App. p. 27. The plea judge ultimately sentenced Petitioner to twenty years, running all of his sentences concurrently, though she could have sentenced him to as much as forty-five. App. pp. 27-28.

At the PCR hearing, Counsel testified she did not recall Petitioner asking her to move the plea court to reconsider his sentence. App. pp. 100-01, 127. Instead, she testified Petitioner's mother informed her Petitioner wanted to pursue an appeal, which Counsel then timely filed on Petitioner's behalf. App. pp. 100-01, 127. The PCR court, in its Order of Dismissal, expressly found this testimony credible. App. p. 165.

Petitioner argues, however, Counsel "should have known" what he actually wanted filed was a motion to reconsider.[3] App. p. 170. This argument is irrelevant because, even assuming Petitioner asked Counsel to file the motion, such a decision is not Petitioner's to make. See Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) ("*What motions to file* and whether to put on evidence so as to preserve the final word in closing argument are... strategic and tactical

[3] Notably, this phrasing is a tacit admission Petitioner did not, in fact, ask Counsel to file a motion.

decisions to be made by trial counsel.") (internal citations omitted) (emphasis added). Additionally, Counsel testified she did not recall Petitioner asking her to do file the motion, but she instead recalled his request for her to file a notice of appeal. App. pp. 100-01, 127. The PCR court specifically found Counsel's version of events to be credible. App. p. 165. Regardless, whether or not to file a motion for reconsideration was Counsel's decision to make, not Petitioner's to demand. She timely filed a direct appeal on his behalf, and the PCR court correctly found her performance not to be deficient and denied relief. App. pp. 165-66.

Even if Counsel's conduct was somehow deficient, deficiency alone is insufficient to support granting post-conviction relief, as Petitioner must prove deficiency *and* prejudice. Strickland, 466 U.S. at 696-97 (ineffectiveness claims involved both a "performance component" and a "prejudice component"). At the PCR hearing, Petitioner's only argument as to prejudice was, essentially, that the appeal was destined to fail because it had no merit. App. pp. 144-45. In his Rule 59(e) motion, Petitioner argued Counsel's decision not to file the motion was deficient[4] because Applicant received a significant sentence, neither victim was injured, and Counsel presented minimal mitigation. App. p. 165. These arguments are unavailing and do not support a finding Petitioner was prejudiced by the lack of a motion to reconsider because it not reasonably likely these argument would have resulted in a reduced sentence in this case.

First, as noted above, Counsel obtained and presented to the plea court approximately twenty letters in support of Petitioner as part of her mitigation evidence, and one of the victims addressed the court on Petitioner's behalf. App. pp. 21, 23-24. The lack of injuries to the victims

[4] Petitioner appears to have conflated "deficiency" with "ineffective assistance." See Strickland, 466 U.S. at 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

was plainly apparent to the plea court, but it is clear the judge was nonetheless – rightly – concerned with Petitioner's dangerous and anti-social behavior in drunkenly firing multiple shots into a crowd of bystanders. App. pp. 17, 21, 27. Finally, as Petitioner himself concedes, the plea judge imposed a lawful sentence within the statutory guidelines. PWC p. 5. Although he received the maximum for each charge, the plea judge chose to run the sentences concurrently, and thus, she sentenced Petitioner to less than half of the maximum term he could have received. App. pp. 27-28.

Petitioner's argument is essentially that he asked Counsel to file a motion to reconsider, and she did not. The PCR court, however, by finding Counsel's testimony credibly, impliedly found Petitioner's testimony was not, and therefore, found no deficiency in Counsel's representation. App. p. 165. In addition, the PCR court specifically stated it had reviewed the record and found "no basis for a successful motion for reconsideration," and therefore, Petitioner was also unable to satisfy his burden as to prejudice. App. pp. 165-66. These factual findings are supported by the record and are therefore entitled to deference on appellate review. Smalls, 422 S.C. at 180, 810 S.E.2d at 839 (explaining 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). Because the PCR court correctly found Counsel was not deficient in filing a notice of appeal as Petitioner requested, nor was Petitioner prejudiced by Counsel's actions, this Court should deny certiorari.

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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