NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF COMMON PLEAS

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case #2014-CP-15-0373

The State, Respondent,

v.

Anthony Terez Brown Appellant.

NOTICE OF APPEAL

Anthony Terez Brown, appeals the decision of the Court, in the order dated January 15, 2021, received by counsel on January 27, 2021, where Mr. Brown was denied his request for Post-Conviction Relief. Mr. Brown was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 1/28/21

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STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Anthony Terez Brown #320539, Applicant,	)	Case No.: 2014-CP-15-373 **Order of Dismissal**
v. State of South Carolina, Respondent.	)	

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections following his guilty plea in Colleton County. On April 13, 2004, Applicant and three co-defendants, armed with handguns, entered a business in Walterboro, South Carolina, where they proceeded to rob then fatally shoot the victim. Applicant was subsequently arrested, and, during its July 2004 term, the Colleton County Grand Jury indicted Applicant for murder (2004-GS-15-418) and armed robbery (2004-GS-15-419). Applicant was represented by James J. Wegmann, Esquire. Assistant Solicitor Terry K. Alexander of the Fourteenth Circuit Solicitor's Office prosecuted the case. Applicant cooperated with the State, including agreeing to plead guilty and testify against a co-defendant. In exchange for his cooperation, the State agreed to dismiss the murder indictment against Applicant.

On March 13, 2007, Applicant appeared before the Honorable Carmen T. Mullen, circuit court judge, and pled guilty to armed robbery pursuant to his plea agreement with the State. After a thorough colloquy, including findings his plea was knowing, voluntary, and intelligent and that he was satisfied with the services of his counsel, Judge Mullen accepted Applicant's guilty plea and sentenced him to thirty years of confinement. As per the plea agreement, the State dismissed

Applicant's murder indictment.

Thereafter, on March 21, 2007, Applicant, through counsel, filed a motion to reconsider his sentence. In this motion, Applicant argued Judge Mullen improperly considered the dismissed murder charge when sentencing Applicant to the maximum term of imprisonment for armed robbery. Judge Mullen denied the motion to reconsider on September 25, 2009, without a hearing.

Applicant sought appellate review from his guilty plea and filed a notice of appeal on September 28, 2009. In an order filed on March 13, 2014, the South Carolina Court of Appeals dismissed the appeal for failure to provide proof of service of the appeal on the State. The remittitur was issued on March 31, 2014.

While his motion to reconsider his sentence was pending, Applicant prematurely filed an application for post-conviction relief (2008-CP-15-0078) on January 23, 2008, alleging the following grounds for relief:

1. Ineffective assistance of counsel in that counsel refused to file an appeal.
2. Involuntary guilty plea.

In response, Respondent filed its return on March 4, 2009. An evidentiary hearing into the matter was convened on September 4, 2009, before the Honorable Alexander S. Macaulay, circuit court judge. Applicant was present at hearing and was represented by Gerald Maree, Esquire. Assistant Attorney General Matthew J. Friedman of the South Carolina Attorney General's Office appeared on behalf of Respondent. Because the motion to reconsider his sentence was still pending, Judge Macaulay dismissed the application without prejudice.

II. CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

2. Involuntary Guilty Plea

Applicant failed to state any specific claims or provide any factual support for these vague claims. For the relief sought, Applicant states he is seeking, "Reverse and Remand."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the evidence presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, as well as the plea transcript. This Court finds the combined record of the plea transcript and the testimony and evidence presented the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

Applicant alleges he received ineffective assistance of counsel such that his guilty plea was rendered involuntary. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300

S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness, and but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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. 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.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his allegations, as addressed below:

Ineffective assistance of counsel and involuntary guilty plea

Applicant alleges plea counsel was generally ineffective and that his guilty plea was

entered involuntarily. However, Applicant has wholly failed to produce any evidence of the alleged deficiency of plea counsel or that his plea was entered involuntarily.

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." Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing tthe guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

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; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

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. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

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 performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not

determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her 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; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman,

337 S.C. at 599, 524 S.E.2d at 624.

However, it is "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). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. North Carolina v. Alford, 400 U.S. 25, 37 (1970). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id. at 31.

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 court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, "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, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977); see also Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). Indeed, admissions 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." Id. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); cf. Blackledge, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings").

An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell

below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In the present case, Applicant's guilty pleas were entered knowingly, intelligently, and voluntarily with the advice of competent counsel. This Court reviewed a signed Rights Advisement form signed by Applicant. Applicant acknowledged his counsel discussed the case at length with him prior to the plea, he understood his Constitutional rights, and he was satisfied with the services of his counsel. Applicant acknowledged he understood the charges he was facing and that he could either plead guilty or not guilty. Applicant acknowledged the Constitutional rights he would have if he proceeded to trial and that he would be surrendering those rights if he plead guilty. Applicant acknowledged he understood what pleading guilty with a recommendation would mean and what pleading guilty without a recommendation would mean. Applicant acknowledged that he wished to enter a plea of guilty to armed robbery because he was guilty and believes it was in his best interest. Applicant acknowledged that he understood that he had ten days to appeal after entering his plea. Applicant acknowledged that his counsel explained all plea negotiations with him and he understood those negotiations. Applicant finally acknowledged that armed robbery carries a minimum sentence of ten years and a maximum sentence of thirty years and is considered a most serious offense (85%). Therefore, combined with his statements to the court during his guilty plea, this Court finds that Applicant entered his plea voluntarily and counsel was not deficient in any way. This allegation is dismissed with prejudice.

Did not knowingly enter the plea due to mental incompetence

Applicant amended his application to include an allegation that he was mental incompetent at the time of the plea and therefore did not knowingly enter his guilty plea.

However, the evidence Applicant ultimately presented of his medical records did not indicate any mental incompetence at the time of the plea and therefore Applicant has failed to meet his burden.

To sustain a claim of incompetency in fact at a plea, applicant in a PCR proceeding must show by the preponderance of the evidence he was incompetent at the time of plea. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). To sustain a claim counsel was ineffective for failing to request a competency hearing, an applicant must show a reasonable probability petitioner would have been found incompetent. Id. Counsel may reasonably rely on his own perceptions in deciding a client is competent to stand trial. Id. Applicant submitted medical records after the hearing for the Court's review. First, the records pre-date the date of Applicant's guilty plea by a number of years. The medical records date back to 2002 and his plea was on March 13, 2007. Nothing in the records address the state of Applicant's mental health at the time of his plea. Further, although the records to indicate that Applicant was experiencing mental health difficulty, nothing specifies what the difficulty was and to a reasonable degree of medical certainty explains if or how the prior difficulties prevented him from being able to knowingly and intelligently plead guilty on March 13, 2007. Therefore, Applicant has failed to meet his burden of proof required of him. This allegation is dismissed with prejudice.

Conclusion

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate

review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 15th day of January, 2021.

Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina