

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

On Petition for a Writ of Certiorari to Richland County
Tanya Gee, Plea Judge
Jocelyn J. Newman, Post-Conviction Relief Judge

Feb 08 2021

S.C. SUPREME COURT

Appellate Case No. 2020-000440

GARY WAYNE THOMAS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

YASMEEN E. KLEIN
Assistant Attorney General
SC Bar No. 104681

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUE ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Issue on Petition for Writ of Certiorari

- I. Did trial counsel err in failing to adequately research petitioner's prior record before the plea proceeding as this would have prepared counsel to correct the solicitor's misstatement regarding petitioner's prior pointing and presenting firearm conviction because the prior did not involve an ex-wife as misstated by the solicitor, which meant that this incorrect summary impacted the plea judge's sentencing analysis to the extent that the misinformation suggested a threatening behavioral pattern, particularly after the solicitor stated that "this victim needs to be protected," and the result was a forty-year sentence despite the fact that the solicitor recommended a thirty-year sentence?

Respondent's Counterstatement of Issue on Petition for Writ of Certiorari

- I. Did the post-conviction relief court properly find Petitioner failed to meet his requisite burden of establishing constitutionally ineffective assistance of counsel for allegedly failing to correct a misstatement of Petitioner's prior criminal history where the record firmly establishes Petitioner has a conviction for the charge at issue, Counsel informed the plea court she did not know whether the solicitor's statement as to the identity of the victim of that charge was correct, Petitioner failed to clarify and correct the statement despite multiple opportunities, and where the sentence was clearly a result of Petitioner's own statement to the court?

STATEMENT OF THE CASE

Gary Wayne Thomas (“Petitioner”) is presently confined within the South Carolina Department of Corrections. During its February 2015 term, the Richland County Grand Jury indicted Petitioner for Armed Robbery (2015-GS-40-00916) and Attempted Murder (2015-GA-40-00183).

On November 15, 2017, Petitioner pled guilty to both charges as indicted before the Honorable Tanya Gee. Tracy E. Pinnock, Esquire (“Plea Counsel”) represented Petitioner, and Assistant Solicitor Meghan Walker prosecuted the case. Judge Gee sentenced Petitioner consecutive terms of imprisonment of thirty years for Attempted Murder and ten years for Armed Robbery. Petitioner did not appeal his conviction or sentence, but instead filed a motion for reconsideration whereby he requested a reduction of his sentence. The motion for reconsideration was heard May 19, 2016, before Judge Gee, who denied the motion by order dated June 29, 2016.

On January 5, 2017, Petitioner sought post-conviction relief alleging he was “in no way a career criminal” and should not have received the maximum sentence for Attempted Murder. On December 5, 2018, the Court convened an evidentiary hearing before the Honorable Jocelyn J. Newman; Leah B. Moody, Esquire represented Petitioner. Petitioner testified on his own behalf and the State presented testimony from plea counsel Tracy Pinnock. At the conclusion of the hearing, Judge Newman denied and dismissed the application by order filed January 29, 2020.

STATEMENT OF FACTS

Petitioner's charges stem from an incident that occurred on August 23, 2014, when he attacked his estranged wife. Petitioner had a prior criminal domestic violence conviction, and preceding the incident he engaged in a pattern of harassing and stalking behavior. Petitioner showed up to his wife's place of employment to confront her, sent messages to her family trying to learn of her locations and activities and who she was with, and would show up to her home unannounced. (App. 5-6). Petitioner believed his estranged wife was having an affair and repeatedly sent her text messages using religion to try to force her to re-enter the marriage. (App. 6). Petitioner's estranged wife attempted to remove herself from the abusive situation by seeking a protective order from the Family Court, but it was denied. (App. 8).

The evening of August 23, 2014, Petitioner's estranged wife returned to her residence when she saw Petitioner coming up behind her with his fist drawn. Petitioner attacked his estranged wife by hitting her repeatedly over her face and head, breaking almost every bone in her face with a two-by-four block of wood. (App. 7, 26). Family called 911 from the residence indicating Petitioner just kept "hitting her, and hitting her" before picking up her purse and running away. (App. 7). Petitioner allegedly took the purse containing his wife's cell phone so he could see who she had been in contact with. Petitioner's estranged wife suffered multiple bilateral fractures from blows directly to her face, including fracture of the sinus walls, a left calvarior fracture, a non-displaced right calvarior fracture, and a brain shift injury (App. 7). Because of Petitioner's attack, she was in the intensive care unit for the majority of the three months she was hospitalized. (App. 7). The solicitor recited Petitioner's prior record, including a previous CDV charge and a charge for pointing and presenting a firearm. (App. 8). The solicitor stated Petitioner's first wife was the victim of the pointing and presenting charge, and neither Plea Counsel nor Petitioner disputed that statement. (App. 8).

After Plea Counsel presented arguments and witnesses in mitigation, Petitioner also elected to give a statement to the court. During his statement, Petitioner told the court this incident occurred because he took his eyes off God, and there was a change in him and he just prays to God for forgiveness. (App. 16). He also stated the victim needed to be forgiven too.¹ (App. 26). Petitioner admitted he was controlling of his family and made his daughters attend church often, but he never intended to harm anyone. (App. 17). The court asked Petitioner to clarify how he did not intend to hurt his estranged wife when he hit her over and over again, and Petitioner responded he had taken his eyes off of God. (App. 17). Petitioner claimed he tried to apologize to his wife but he was unable to. (App. 17).

Judge Gee sentenced Petitioner to a term of thirty years' imprisonment for Attempted Murder, and ten years for Armed Robbery, to be served consecutively. In pronouncing the sentence, Judge Gee explained that after listening to all statements, she did not believe Petitioner when he said he wanted to apologize to his wife and indicated that she heard no remorse from Petitioner. (App. 19).

Plea Counsel filed a motion to reconsider Petitioner's sentence. (App. 24). At the hearing on the motion, Judge Gee stated she remembered Petitioner's plea, and she "had not expected to give [Petitioner] the sentence [] either until [Petitioner] spoke." (App. 26). Judge Gee specifically recalled Petitioner saying the "victim needed to be forgiven too, and noted the fact that Petitioner placed blame on the victim, and how Petitioner's anger and belief that his wife was unfaithful

¹ The plea transcript reflects that portions of Petitioner's statement were inaudible; however, the fact that he made this statement was discussed at the reconsideration hearing. Petitioner did not challenge or deny that he made the statement at the reconsideration hearing, and he never alleged it he did not say it in his application or PCR hearing. Moreover, Plea Counsel also accepted the fact that he made this statement, and she did not dispute Judge Gee's recollection when it was raised at the reconsideration hearing. (App. 26, 74).

contributed to her decision. (App. 26). Judge Gee concluded by stating that Plea Counsel represented her client well, but that she “wasn’t expecting to give [Petitioner] the sentence I did until he spoke for himself” (App. 26). The Court denied the motion by order dated June 29, 2016.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, Petitioner asserts the post-conviction relief court erred in denying him relief because Plea Counsel was allegedly ineffective for failing to research Petitioner's prior record to correct the solicitor's misstatement during the plea hearing. Petitioner contends Plea Counsel's alleged deficiency prejudiced him by making his record appear worse than it is and painted him as habitually violent, which in turn negatively affected the sentence he received. However, the post-conviction relief court properly determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective because the plea judge clearly and repeatedly indicated her sentencing decision was based on Petitioner's own statement to the plea court, which the plea court found to be devoid of remorse. Accordingly, 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 decision-making” 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 meet his requisite burden of establishing constitutionally ineffective assistance of counsel for allegedly failing to correct a misstatement of Petitioner’s prior criminal history where the record firmly establishes Petitioner has a conviction for the charge at issue, Counsel informed the plea court she did not know whether the solicitor’s statement as to the identity of the victim of that charge was correct, Petitioner failed to clarify and correct the statement despite multiple opportunities, and where the sentence was clearly a result of Petitioner’s own statement to the court.

At the plea hearing, the court was informed about Petitioner’s prior criminal domestic violence (“CDV”) convictions as well as a conviction for Pointing and Presenting a Firearm (“P&P”), which the solicitor alleged was the result of Petitioner pointing a gun at his first wife. However, Petitioner testified at the PCR hearing that the victim of the P&P was actually a man, not his first wife, and he argued Plea Counsel was ineffective for failing to challenge or correct this fact. (App. 21). The record reflects that Plea Counsel did in fact dispute the solicitor’s characterization of the prior conviction, as she had not discussed it with the solicitor whatsoever (App. 15). Additionally, although Petitioner testified that during the plea hearing he felt Plea Counsel should have moved for a continuance to discuss those charges, he admitted he never said anything to Plea Counsel about it during the plea. (App. 74). Petitioner further admitted he did not discuss the pointing and presenting conviction with Plea Counsel after the plea, and he did not bring the discrepancy to Plea Counsel’s attention for the hearing on the motion to reconsider. (App. 76, 84). Ultimately, Petitioner conceded he had a chance to correct the record himself when he spoke to the plea court, and he did not do so. (App. 92-93).

Plea Counsel testified that she objected to the solicitor’s characterization of the charge during the plea hearing because she did not expect the solicitor to name the victim, prompting her

to inform the court that they had not discussed the specifics of the crime. (App. 15, 108-09, 118). Plea Counsel stated Petitioner never gave her details of the charge or the identity of the victim. During his testimony, Petitioner confirmed he did not discuss the nature of his P&P conviction when Plea Counsel reviewed his RAP sheet with him. (App.74-75). Despite having a clear opportunity to point out the misstatement to Plea Counsel after she objected to the solicitor's characterization during the plea hearing, Plea Counsel testified Petitioner never asked her to clarify or correct the details of his prior convictions, and never expressed issue with the way the solicitor characterized his charge. (App. 109). Plea Counsel stated that while she did not anticipate the solicitor discussing the details of Petitioner's previous charges, the only issue was the identity of one of the victims, not the fact that this previous charge was on his record, as he did in fact have a conviction for pointing and presenting. (App. 108).

Moreover, Petitioner's allegation that this issue substantively affected the plea judge's sentencing analysis is clearly refuted by the record. Judge Gee noted multiple times during the plea hearing and the hearing on Petitioner's motion for reconsideration that Petitioner's sentence was entirely predicated on own his statement and presentation to the court. (App. 136). At the reconsideration hearing, Judge Gee explained the sentence she imposed was a result of Petitioner's actions, not those of Plea Counsel. The court clearly articulated its reasoning in imposing the forty-year sentence, explaining:

...I had not expected to give him the sentence I had either until Mr. Thomas spoke. And when he spoke, he said that the victim needed to be forgiven too. And there was a lot of blame put on the victim and not personal blame taken. And I believed the victim needed to be protected . . .

[A]nd upon hearing what he had to say for himself... the anger that he still had towards this victim, who he blamed because he believed she was talking to another man or whatever he thought she was doing; made me realize that if he was not incarcerated, that victim,

who he attempted to kill with a two-by-four, would be at risk of being victimized again.

So I'm just explaining to you where that forty-year sentence came from. . . . But just so you understand that it wasn't that you asked for ten years. I mean, you certainly did nothing wrong. You represented your client, you represented your client well. I wasn't expecting to give him the sentence that I did until he spoke for himself.

(App. 26)

Further, Judge Gee clarified she did not want Petitioner to “grovel or sob about what happened.” However, she “did not expect him to say that God needed to forgive the victim for the things that she had been doing. That was unexpected to [the court].” (App. 31). Judge Gee concluded that when Petitioner spoke on his own behalf, he said volumes and triggered the sentence in his case. (App. 31).

The record clearly establishes Petitioner’s presentation to the court and his lack of remorse were the deciding factors to Judge Gee’s sentencing decision, not the solicitor’s alleged error of briefly misstating the identity of the victim of a previous conviction which also arose from a domestic violence situation. Petitioner alleges this minor error tipped the scale of prejudice against him, and painted him as a serial assaulter, even though Petitioner acknowledges his record contains multiple criminal domestic violence convictions. (App. 74-75; PWC. 4). Further, as the post-conviction relief court pointed out, Petitioner was present, heard the alleged error, and failed to correct it by either alerting his lawyer, or raising the issue when he spoke to the plea court himself during his plea and on reconsideration. (App. 133-35).

Therefore, the post-conviction relief court correctly found Plea Counsel’s performance was not deficient, nor did her performance prejudice Petitioner. Both the PCR court and the plea court found Plea Counsel represented Petitioner to the best of her ability, but Plea Counsel could not control what Petitioner said. (App. 136). Plea Counsel indicated she asked Petitioner what he

intended to say to the court prior to the plea hearing, but Petitioner would not tell her. (App. 101-02). Plea Counsel testified that ultimately her goal was to fix what Petitioner had presented to the plea court, as his own statements caused his harm. (App. 119). Petitioner does not deny his statement the victim needed to be forgiven or his inexplicable assertion to the plea court that he was not trying to hurt the victim when he repeatedly beat her face with a two-by-four piece of wood. His claim that it was Plea Counsel's conduct that caused Judge Gee to sentence him as she did is unsubstantiated, and plainly contrary to the record. The PCR court properly denied relief on these grounds, and this Court should likewise deny certiorari.

CONCLUSION

As the PCR court correctly found Petitioner failed to meet his burden of establishing ineffective assistance of counsel, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

YASMEEN E. KLEIN
Assistant Attorney General
S.C. Bar No. 104681

By: 
ATTORNEYS FOR RESPONDENT

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

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