STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

Honorable Thomas A. Russo, Plea Judge
Honorable Michael G. Nettles, First PCR Judge
Honorable D. Craig Brown, Second PCR Judge

Appellate Case No. 2017-000654

Fonnelze Delane,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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PETITIONER'S ISSUES PRESENTED

I. Whether trial counsel rendered ineffective assistance counsel by advising Petitioner to plead guilty to accessory before the fact of murder when Petitioner wanted to exercise his right to a jury trial?

II. Whether trial counsel rendered ineffective assistance counsel by failing to have its mitigation consultant present during Petitioner's sentencing and failing to introduce any exhibits during the sentencing proceeding?

RESPONDENT'S ISSUES PRESENTED

I. Did the PCR court correctly find Petitioner's counsel rendered effective assistance in advising him to enter a guilty plea to accessory before the fact of murder, and Petitioner entered the plea freely and voluntarily?

II. Did the PCR court correctly find Petitioner's counsel rendered effective assistance in the presentation of mitigation evidence during Petitioner's sentencing proceeding where counsel engaged a mitigation expert to research Petitioner's background and presented testimony from Petitioner's mother, and Petitioner failed to present any additional witnesses or testimony at the evidentiary hearing?

STATEMENT OF THE CASE

Fonnelze Delane (Petitioner) is presently confined in the South Carolina Department of Corrections. In March 2009, the Florence County Grand Jury indicted Petitioner for possession of cocaine base with intent to distribute (2009-GS-21-0106), and in June 2009, for three counts of distribution of cocaine base (2009-GS-21-0707). While awaiting trial on these charges, Petitioner was arrested for his involvement in the death of two confidential informants. In July 2012, the Grand Jury issued indictments for two counts of murder, two counts of accessory before the fact to murder, two counts of solicitation to commit murder, and a single count of conspiracy (2012-GS-21-0897). Paul Cannarella (Cannarella) and W. James Hoffmeyer (Hoffmeyer) represented Petitioner on all charges.

On March 5, 2010, the State served Petitioner and his attorneys with a notice of intent to seek the death penalty. The State alleged the aggravating factors warranting the death penalty were that the murders were committed by another person as Petitioner's agent or employee, the murders were of two people pursuant to one scheme or course of conduct, and the victims were witnesses who were killed for the purpose of impeding or deterring the prosecution of a crime. The Honorable Thomas A. Russo was appointed to preside over Petitioner's case.

On October 8, 2013, after qualifying a jury in preparation for trial, the State withdrew its notice of intent to seek the death penalty, and Petitioner pleaded guilty to two counts of accessory before the fact to murder and two counts of distribution of cocaine base. In exchange for the plea, the State dismissed the remaining charges. Petitioner entered his plea without negotiation or recommendation as to sentencing, and Judge Russo sentenced him to concurrent terms of life without the possibility of parole on each count of accessory before the fact to murder and thirty years for each count of distribution of cocaine base. Petitioner did not appeal his plea or sentence.

Petitioner filed an application for post-conviction relief on February 10, 2014 (2014-CP-21-0369). The State filed its return on June 30, 2014. An evidentiary hearing convened on January 30, 2018, at the Florence County Courthouse before the Honorable Michael G. Nettles. Petitioner was represented by Justin Kata, Esquire. On October 4, 2018, Judge Nettles signed an order denying post-conviction relief, which was filed October 8, 2018. Petitioner did not appeal the denial of his application for post-conviction relief.

Petitioner filed a second PCR action (2019-CP-21-0327) on February 8, 2019, seeking belated appellate review of the denial of relief in his previous PCR action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent made its return on September 9, 2019, and an evidentiary hearing on the matter convened on December 19, 2019, at the Florence County Courthouse before the Honorable D. Craig Brown. Petitioner was present at the hearing and represented by Jonathan D. Waller, Esquire. At the call of the case, Respondent informed the PCR court that based on its investigation of the allegation, Petitioner's request for relief pursuant to Austin v. State was proper and relief was appropriate in this case. Judge Brown signed a Consent Order, filed April 15, 2020, granting Petitioner the right to seek belated appellate review of the denial of relief in his previous PCR action.

Petitioner then timely filed a notice of appeal pursuant to the procedures set forth in Austin.

STATEMENT OF THE FACTS

On September 16, 2008, and September 26, 2008, Billy Hall (Hall) acted as a confidential informant (CI) in a controlled buy of crack cocaine from Petitioner, which was recorded on video for the Florence County Sherriff's Office. Tr. pp. 65-66. Petitioner was charged with two counts of distribution related to those charges, and as part of the preparation of that case, he viewed the video of the buy with his attorney. Tr. pp. 66-67. Although the CI was not shown on the video and the sound was muted, Petitioner was able to identify Hall as the informant because he recognized some of the items, including medical equipment and a handicap sticker, in the vehicle driven by the CI. Tr. pp. 66-67.

Petitioner told his girlfriend at the time, Valerie Paul, that he thought he had identified the informant as Hall, and that he was going to "do something" about it. Tr. p. 67. Paul anonymously contacted Allen Rhodes (Rhodes), an officer in the narcotics unit, because she was afraid Petitioner was going to harm Hall and his girlfriend, Tanya Polston (Polston). Tr. pp. 67-68. At the same time, the Sherriff's Office received a 911 call from Polston and responded to the scene, finding both Hall and Poston dead. Tr. p. 68.

Rhodes eventually identified Paul as the tipster, interviewed her, and began an investigation into Petitioner. Tr. p. 68. Using phone records, Rhodes connected Petitioner to codefendants Laross Graham (Graham) and Montez Barker (Barker). Tr. p. 68. Graham eventually gave a statement admitting Petitioner recruited him to kill Hall and Polston for two-thousand dollars and a quantity of drugs, and he also provided Graham with a gun and bullets. Tr. pp. 68-69, 72. Graham balked and in turn recruited Barker to be the triggerman. Tr. p. 69.

On the night before the murders, Graham and Petitioner were together in Petitioner's recording studio, and Petitioner ordered Graham to ensure the killings were carried out the

following day. Tr. p. 69. The next morning, phone records revealed approximately twenty phone calls and text messages between Petitioner and Graham, as well as phone calls to Talya Polston, up until the time Polston and Hall picked up Graham and Barker in Polston's vehicle. Tr. pp. 69-70. The communications then stopped for approximately thirty minutes, until Polston called 911 to report that she had been shot. Tr. p. 70.

Graham and Barker then attempted to dispose of Polston's vehicle by setting it on fire, and a cousin of Petitioner's, Anthony Wingate, confessed to disposing of the murder weapon. Tr. p. 70. Barker had recently been released from prison and was wearing an ankle monitor, which allowed law enforcement to track his movements through the area at the time of the murders and to the place where the burned car was discovered. Tr. p. 70.

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

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. 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., 300 S.C. 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 that, 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).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant 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). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). 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." North Carolina v. Alford, 400 U.S. 25, 31 (1970). Where a defendant is represented by counsel during the plea process and enters his plea with the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

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.

I. The PCR court correctly found Petitioner's counsel rendered constitutionally effective assistance in advising him to enter a guilty plea to accessory before the fact of murder, and Petitioner entered the plea freely and voluntarily.

Petitioner alleges his counsel were ineffective for advising him to enter a favorable guilty plea because Petitioner wanted a trial instead. Specifically, Petitioner contends counsel engaged

in a "pressure campaign" to force Petitioner to plead guilty, such that his plea was involuntary. The PCR court found Petitioner's decision to plead guilty was freely and voluntarily made, particularly since the plea removed the possibility of the death penalty, and there is probative evidence in the record to support such findings. Because these issues are matters of credibility, the PCR court's determination as to these issues is entitled "great deference." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)) (explaining this Court "gives great deference to a PCR judge's findings where matters of credibility are involved"). This Court should therefore deny certiorari as to this issue.

Petitioner argues he was "forced" to accept an extremely favorable guilty plea because his attorneys were "angry," and he was scheduled to go to trial, so he felt like he had no other choice. PWC p. 7. However, Petitioner did not agree to enter the guilty plea *until during jury selection*. App. p. 160. Clearly, had Petitioner wished to continue exercising his right to have a trial, he could have done so as he did not enter his guilty plea until after the parties began the process of selecting a jury. App. p. 160. Moreover, the only evidence Petitioner points to as to the "pressure" exerted by his attorneys is that Hoffmeyer was "angry" when Petitioner called him on his personal cell phone late on a Sunday to inform Hoffmeyer he was not going to plead guilty. PWC p. 7; App. p. 169.

On the other hand, Hoffmeyer testified the idea of Petitioner entering a plea bargain had been discussed for weeks between Petitioner, his attorneys, Petitioner's mother, and the experts hired to work on Petitioner's case. App. pp. 160, 170. As is required of competent counsel, Hoffmeyer advised Petitioner of the "pluses and minuses" of pleading guilty "and then it was [Petitioner's] decision." App. pp. 151, 160-61. As Petitioner himself acknowledged, entering the plea ensured Petitioner would not be put to death. App. p. 177. Petitioner testified during the plea

he was satisfied with the services of his attorneys and agreed they had investigated all aspects of the case and contacted witnesses of his behalf. App. pp. 63-64. Judge Russo, in accepting the plea, conducted a thorough colloquy with Petitioner wherein Petitioner was asked multiple times whether he wanted to plead guilty instead of continuing with the trial process and whether he had been pressured or coerced to accept the plea agreement, and Petitioner told the court he had made the decision freely and voluntarily. App. pp. 55, 60, 63, 65.

Hill makes clear the prejudice prong ordinarily requires "something more" than simply a defendant's assertion that but for counsel's deficient performance he would not have pleaded guilty, but would have gone to trial. Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (citing Hill, 474 U.S. at 58–59); see also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Rather, a PCR applicant must show some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009); see also Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 357 (2006) (holding no evidence showed counsel's failure to investigate a potential witness would have yielded a result different from that which defendant's counsel believed at the time of the plea and defendant pleaded guilty in light of the complete information available at that time), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Additionally, "to 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." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

Here, Petitioner does not contend his counsel gave incorrect advice as to any issue involving the plea agreement and instead argues only that he felt "pressure" in the process. However, many factors may legitimately influence a decision to plead guilty, such as the reduction of stress on a defendant and his or her family, the removal of uncertain consequences, and reduction of actual sentencing exposure. McMann v. Richardson, 397 U.S. 759, 768–69 (1970). See also Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992) ("[A]lthough petitioner pled guilty to avoid a possible death sentence, the plea was entered with knowledge of the sentences attendant to the guilty plea and so was knowing and voluntary."); Cf. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (pointing out that the imposition of the difficult choice between going to trial and pleading guilty is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas). In this case, by pleading guilty, Petitioner received a substantial bargain in that the State removed the possibility of a death sentence and dismissed two count of murder, allowing Petitioner to guilty only to the accessory and drug charges, which Hoffmeyer believed the State had sufficient evidence to support. App. pp. 159-60.

The PCR court properly weighed the testimony from Petitioner and his attorneys at the evidentiary hearing, along with the record of the plea hearing, and found the plea colloquy was dispositive, as Petitioner asserted he was pleading guilty freely and voluntarily. App. pp. 217-18. Because the PCR court committed no error of law and in deference to its factual findings, this Court should deny certiorari as to this issue.

II. The PCR court correctly found Petitioner's counsel rendered effective assistance in the presentation of mitigation evidence during Petitioner's sentencing proceeding where counsel engaged a mitigation expert to research Petitioner's background and presented testimony from Petitioner's mother, and Petitioner failed to present any additional witnesses or testimony at the evidentiary hearing.

Petitioner asserts his counsel were deficient in his handling of Petitioner's mitigation presentation during sentencing because the mitigation consulted hired by counsel was not present during sentencing and counsel did not introduce any exhibits. PWC p. 9. The PCR judge denied Petitioner's application, correctly finding Petitioner failed to meet his burden of proof in showing either deficiency or prejudice because, after investigation, trial counsel determined there was no viable mitigation evidence to present, other than testimony from Petitioner's mother. App. p. 218. Additionally, Petitioner failed to introduce any of the evidence or witnesses he claims should have been presented to the plea court. App. p. 50. This Court should therefore deny certiorari on this issue.

As an initial matter, Petitioner's claim on this issue must fail because Petitioner cannot establish he was prejudiced by counsel's alleged failure as Petitioner did not introduce the evidence or witnesses at the evidentiary hearing that he claims counsel should presented during sentencing. Therefore, this allegation is supported by nothing more than speculation, which is insufficient to meet Petitioner's burden of proof. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). "This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see also Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding

trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

In addition to Petitioner's complete lack of evidence to support these claims, the PCR court properly determined counsel were not deficient because they hired a mitigation consultant, who, by Petitioner's own admission, conducted a thorough investigation of Petitioner's background. App. pp. 165-66, 217. However, Hoffmeyer testified she was unable to uncover any evidence of value to be used in mitigation. App. pp. 184-85. Hoffmeyer explained that although Petitioner grew up in "a very low-income family," he did not have significant mental health issues or a history of mental illness; he was not abused as a child; he was raised in a home with a mother who loved and cared for him, and he did not see "the type of mitigation that you would hope in these terrible circumstances to have in a sentencing phase." App. pp. 183-84. Additionally, Hoffmeyer testified he did not call the expert as a witness because he felt he effectively conveyed what little mitigation evidence was available through his own presentation. App. pp. 184-85.

Petitioner asserts the PCR court made an error of law because it "essentially held that counsel did not have a duty to attempt to mitigate Petitioner's sentence form life to a term of years." PWC p. 11. This is a baffling misreading of the PCR court's ruling. In fact, the PCR court found Hoffmeyer fulfilled his obligation to attempt to mitigate Petitioner's sentence as best he could given the lack of any obvious mitigation evidence or argument. The PCR court noted

Hoffmeyer had the benefit of the mitigation consultant's investigation and report during sentencing, and he credibly testified that while the consultant concluded Petitioner did not have an ideal home life growing up, there was nothing in Petitioner's background to explain the severity of the criminal behavior in this case. App. p. 217. The PCR court found counsel made a reasonable strategic decision not to call the consultant to testify because she was unable to offer anything of additional value in mitigation that Hoffmeyer could not convey to the judge himself. App. p. 217. Finally, the PCR court pointed out that Petitioner's mother and sister were present for sentencing, and Petitioner's mother spoke on his behalf, demonstrating family support. App. pp. 83-84, 99, 217.

Because the PCR court committed no error of law and in deference to its factual findings on this issue, this Court should affirm the decision denying relief, and likewise deny certiorari on this issue.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's denial of relief as Petitioner's counsel were not deficient in any way, nor was Petitioner prejudiced by their representation. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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