

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Richland County
Court of Common Pleas

Honorable Clifton Newman, Plea Judge
Honorable DeAndrea G. Benjamin, Post-Conviction Relief Judge

Appellate Case No. 2020-000104

David Keith McElveen,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

- I. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty when Counsel failed to review all discovery with Petitioner?
- II. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty when Counsel failed to adequately prepare for trial and move for a continuance on the morning of trial?
- III. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel and in finding Petitioner knowingly and voluntarily pled guilty when Counsel failed to advise Petitioner on the State's ability to request a substantial sentence at the plea hearing?
- IV. Did the PCR Court err in finding Plea Counsel provided effective assistance of counsel by failing to file a motion for reconsideration?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

- I. Did the PCR court correctly find Petitioner's counsel rendered effective assistance and Petitioner entered his guilty plea freely and voluntarily where Counsel reviewed all relevant discovery with Petitioner prior to the plea, and Petitioner did not introduce the items of discovery he claims he did not see at the evidentiary hearing?
- II. Did the PCR court correctly find Petitioner's counsel rendered effective assistance and Petitioner entered his guilty plea freely and voluntarily where Petitioner did not introduce any evidence or witnesses to show how additional trial preparation would have had any possible effect on Petitioner's decision to plead guilty, if Counsel had requested a continuance?
- III. Did the PCR court correctly find Petitioner's counsel rendered effective assistance and Petitioner entered his guilty plea freely and voluntarily where Petitioner understood the possible sentencing range and the terms of the plea agreement prior to entering his plea?
- IV. Did the PCR court correctly find Petitioner's counsel rendered effective assistance and Petitioner entered his guilty plea freely and voluntarily where Counsel offered a reasonable strategic explanation for his decision not to file a motion for reconsideration?

STATEMENT OF THE CASE

David Keith McElveen (Petitioner) is incarcerated with the South Carolina Department of Corrections. Petitioner was indicted by the April 2015 term of the Richland County Grand Jury for two counts of armed robbery (2015-GS-40-01590), one count of first-degree burglary (2015-GS-40-01599), and one count of assault and battery in the first-degree (2015-GS-40-01592). Mark E. Schnee (Counsel), Esquire, represented Petitioner. Assistant Solicitor Margaret Bodman prosecuted the case on behalf of the State. On March 14, 2016, Petitioner appeared before the Honorable Clifton Newman and pleaded guilty as indicted to first-degree burglary and one count of armed robbery. In return, the State dismissed the second armed robbery charge, as well as the charge of assault and battery in the first degree. Judge Newman sentenced Petitioner, without negotiation or recommendation, to eighteen years' imprisonment for armed robbery and twenty-two years for burglary, with the sentences to run concurrently. Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief on August 3, 2016, and amended, through counsel, on August 22, 2017, and again on June 19, 2018. Respondent made its return on May 18, 2017. An evidentiary hearing into the matter convened on July 16, 2018, at the Richland County Courthouse before the Honorable DeAndrea G. Benjamin. Kristy Grafton Goldberg, Esquire, represented Applicant. On January 3, 2020, Judge Benjamin signed an order denying post-conviction relief, which was filed January 7, 2020. Petitioner timely appealed the denial of his application for post-conviction relief.

STATEMENT OF THE FACTS

On September 14, 2014, around 2:15 am, Petitioner's codefendants, Jason Boykin and Michael McCoy, knocked on the door of the home were the victim, David Hollis, lived with his girlfriend Eva. App. pp. 7-8. Boykin and McCoy drew guns on Hollis and forced their way into the home, demanding to know where Hollis kept "the \$30,000." App. p. 9. Eventually, upon realizing there was no significant amount of money in the house, Boykin and McCoy fled the home with Hollis's wallet, some cash, and both Hollis and Eva's cell phones. App. p. 10. Petitioner drove Boykin and McCoy away from the scene, while being chased by Hollis, who was in his own truck. App. pp. 10-11. Hollis chased the getaway car, eventually ramming it and causing it to crash. App. p. 11.

Petitioner, Boykin, and McCoy fled the scene, but law enforcement recovered a debit card from McCoy and Petitioner's cell phone, which were left behind in the car. App. pp. 11-12. Petitioner's DNA was also matched to DNA collected from the steering wheel of the getaway car. App. p. 12. On Petitioner's cell phone, investigators discovered text messages from Petitioner to McCoy telling McCoy, "I have a lick for us to do." App. p. 12. Eventually, both McCoy and Petitioner confessed their involvement in the crime, with Petitioner admitting he set up the robbery after learning through his girlfriend that Hollis had received a worker's compensation settlement of \$30,000. App. pp. 8, 13-15.

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 effective assistance and Petitioner entered his guilty plea freely and voluntarily where Counsel reviewed all relevant discovery with Petitioner prior to the plea, and Petitioner did not introduce the items of discovery he claims he did not see at the evidentiary hearing.

Petitioner alleges Counsel ineffective for advising him to enter a guilty plea without reviewing all discovery with Petitioner. However, the PCR court found Petitioner’s decision to plead guilty was freely and voluntarily made, particularly since Counsel credibly testified he had reviewed all discovery relevant to Petitioner’s decision making process with Petitioner prior to the entry of the plea, and Petitioner admitted he knew there were items in discovery he had not seen before he pleaded guilty. Because these issues are matters of credibility, the PCR court’s determination 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”). Moreover, Petitioner failed to meet his burden of proving prejudice because he did not introduce any items of discovery he claims he did not see, nor did he offer any testimony as to how such items would have changed his decision to plead guilty. Accordingly, this Court should deny certiorari as to this issue.

Petitioner argues Counsel “admitted that he failed to review all discovery with Petitioner. . . .” PWC p. 16. This is a misstatement of Counsel’s testimony as a whole. Counsel clearly testified he sufficiently reviewed all *relevant* discovery with Petitioner – the items which would have made a difference in Petitioner’s decision making process – prior to Petitioner’s plea. App. pp. 100-02. Counsel stated he did not necessarily review with Petitioner “every page” of “paperwork that has nothing to do with what’s actually involved in the case,” but they “went through all of the facts and details of the incident.” App. p. 112. Essentially, Counsel was making

a distinction between discovery that was necessary for Petitioner to decide whether he wanted to plead guilty or go to trial, and discovery that was more related to trial preparation, such as official forensic reports of already-known test results. App. pp. 102, 112, 113-14. Counsel also testified he and Petitioner received all of the “decision making” material well in advance of the scheduled trial date, which was the date Petitioner eventually pleaded guilty. App. pp. 111-12. Additionally, Petitioner conceded he knew there were some items of discovery he had not seen prior to entering his guilty plea. App. pp. 9-92. Nonetheless, he never raised this as an issue to the plea court, and in fact, to the contrary, he affirmed to the plea court he had enough time to talk with Counsel, and he was satisfied with Counsel’s work on his case. App. pp. 4.

Thus, there is probative evidence in the record to support the PCR court’s finding “Counsel met with [Petitioner] on multiple occasions to review discovery, discuss the facts of the case, and explain [Petitioner’s] constitutional rights and options for resolving the case,” and Counsel was not deficient in his review of discovery with Petitioner. App. p. 141. These findings were predicated on Counsel’s “credible” testimony “he reviewed... the State’s evidence [and] the potential strengths and weaknesses of each side’s case. . . .” with Petitioner. App. p. 140. As discussed above, the PCR court’s credibility findings are entitled to “great deference” on appellate review. Simuel, 390 S.C. at 270, 701 S.E.2d at 739.

Moreover, 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).

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, Petitioner candidly testified he pleaded guilty in hopes of avoiding a sentence of life without parole should he be convicted of the first-degree burglary at trial. App. p. 96. Additionally, both Petitioner and Counsel repeatedly

testified Petitioner never intended to take the case to trial and only wanted to negotiate the best possible plea offer he could. App. pp. 80, 82, 111.

Most importantly, however, Petitioner did not introduce any evidence or otherwise offer any testimony as to what items in discovery he did not see at the time that would have changed his mind. Petitioner testified only that he “wanted to see all the probable cause that led up to my arrest,” but he never specified what that meant or detailed evidence he had uncovered in the discovery since his plea, nor did he explain how that would have changed his decision to plead guilty. App. p. 92.

“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). Petitioner cannot establish he was prejudiced by Counsel’s alleged failure to review all discovery with him, as Petitioner did not introduce the evidence or witnesses at the evidentiary hearing that he claims Counsel should discussed with him prior to the guilty plea. Therefore, this allegation is supported by nothing more than speculation, which is insufficient to meet Petitioner’s burden of proof on the prejudice prong. 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).

The PCR court properly weighed the testimony from Petitioner and Counsel at the evidentiary hearing, along with the record of the plea hearing, and found the combination of the plea colloquy and Counsel’s credible testimony was dispositive as to this issue. App. pp. 140-41. 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 and Petitioner entered his guilty plea freely and voluntarily where Petitioner did not introduce any evidence or witnesses to show how additional trial preparation would have had any possible effect on Petitioner’s decision to plead guilty if Counsel had requested a continuance.

Petitioner asserts Counsel was deficient for failing to adequately prepare for trial and move for a continuance. However, Petitioner did not introduce any evidence or witnesses to show how additional preparation would have had any possible effect on his decision to plead guilty, and therefore he has failed to meet his burden of proving prejudice. This Court should therefore deny certiorari on this issue.

Petitioner did not introduce the evidence or witnesses at the evidentiary hearing that he claims he would have been able to present with additional time for trial preparation, nor did he offer any explanation for how a continuance would have changed his decision to plead guilty. In fact, Counsel testified he never expected this case to end with a trial because Petitioner only ever wanted to plead guilty. App. pp. 102, 111. Because of this, Petitioner cannot meet his burden as to prejudice, and this claim must fail. “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 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).

Accordingly, this Court should affirm the decision denying relief, and likewise deny certiorari on this issue.

III. The PCR court correctly found Petitioner’s counsel rendered effective assistance and Petitioner entered his guilty plea freely and voluntarily where Petitioner understood the possible sentencing range and the terms of the plea agreement prior to entering his plea.

Petitioner argues Counsel was deficient for failing to explain to Petitioner that the State could request a substantial sentence at the plea hearing, and this failure rendered Petitioner’s guilty plea involuntary. PWC p. 22. Petitioner contends he believed the State would be silent as to sentencing, and Counsel should have objected when the solicitor requested a “substantial sentence.” App. pp. 86-87. On the other hand, Counsel testified Petitioner knew the State wanted something more than the minimum of fifteen years, and the PCR court correctly found the plea was voluntarily entered based on this credible testimony from Counsel, as well as the record of the plea. Accordingly, this Court should deny certiorari as to this issue.

Petitioner acknowledged he was aware the sentencing range for these charges was fifteen years up to life without parole. App. p. 85. Additionally, the plea court clearly informed Petitioner of the potential sentencing range for each charge, including the mandatory minimum sentences. App. p. 3. Petitioner affirmed he had enough time to talk with Counsel, understood the nature of

charges and possible punishments, and represented no promises had been made to induce him to plead. App. p. 4. However, at the evidentiary hearing, he maintained that because the sentencing sheet said “without recommendation,” he believe the State would be silent as to sentencing. App. p. 86-87. Counsel confirmed Petitioner was advised he was pleading guilty as charged and could theoretically receive up to a life sentence. App. pp. 108-09, 123. Although Counsel stated he could not recall the exact words used when discussing what a “straight up” plea meant, he testified Petitioner knew the defense would request the minimum, and the State obviously wanted more than that, otherwise there would have been an agreement for fifteen years. App. pp. 108, 119.

Additionally, both Petitioner and Counsel testified the State had previously made a plea offer of fifteen-to-twenty-five years, which logically indicates the range of sentence the State was seeking, and Petitioner was sentenced within this range. App. pp. 77, 102-03, 153, 158. Counsel testified although both he and Petitioner knew the State wanted more than fifteen years, the solicitor never told him an exact number she would request, so he had nothing definitive to pass on to Petitioner. App. pp. 118-19, 122-23. Indeed, the solicitor did not request or recommend a specific term of years, and it was the investigating officer who asked for a “substantial prison sentence.” App. p. 16. The State argued only that the facts of the case were egregious enough that Petitioner should not receive the minimum sentence, and even with the fifteen-to-twenty-five years offer, she “was never saying... that this was in fact a 15 [year case].” App. p. 23. Additionally, she stated the agreement as to sentencing had always been that the defense could make its argument, and the State would make its own. App. pp. 23-24. Neither Petitioner nor Counsel objected to this characterization of the agreement during the plea hearing, even though both Counsel and Petitioner had an opportunity to address the plea court again after the State’s presentation. App. pp. 24-25.

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his 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. 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 question is whether Petitioner, if correctly informed of circumstances surrounding the plea, would still have pleaded guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Here, Petitioner was unquestionably aware he was pleading "straight up" with a possible sentencing range of fifteen years to life without parole in the discretion of the judge. App. p. 85. Moreover, based on a reading of the record as a whole and the logical inferences to be drawn therefrom, Petitioner understood the State was seeking, at a minimum, a sentence in the fifteen-to-twenty-five year range, which is exactly what Petitioner ultimately received. App. pp. 77, 102-03, 153, 158. Finally, as discussed in Section I above, Petitioner's motivation in entering the plea was always to avoid the potential for a life sentence and to try to receive something less than he would if convicted at trial. App. p. 96.

Therefore, the PCR correctly found Petitioner "failed to meet his burden of proof as to deficiency or prejudice as to the allegation Counsel failed to adequately advise and assist him in resolving this case in an appropriate manner." App. p. 141. This Court should deny certiorari.

IV. The PCR court correctly find Petitioner’s counsel rendered effective assistance and Petitioner entered his guilty plea freely and voluntarily where Counsel offered a reasonable strategic explanation for his decision not to file a motion for reconsideration.

Petitioner also alleges Counsel was ineffective for failing to file a motion to reconsider. However, because the PCR court correctly found Counsel gave a reasonable strategic reason for his decision not to do so, this Court should deny certiorari as to this issue.

“Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. “Decisions primarily involving trial strategy and tactics may be made by trial counsel.” Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (quoting Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998)) (emphasis added). Which motions to file is considered a strategic and tactical decision properly made by trial counsel, not the client. Id. Further, there is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)); see also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy).

Here, Petitioner asserts Counsel acted unreasonably in failing to file a motion to reconsider the sentence because “Judge Newman... is one of those judges that will actually sentence someone higher just because you told him you didn’t like his first sentence.” PWC p. 24. However, Counsel actually testified he never definitively told Petitioner he *would* file such a motion, and instead stated he would review the record to make sure the solicitor had not said anything incompatible with the evidence and discovery that *could* be a basis for a motion. App. pp. 106-08. Counsel testified he did so, and also reviewed the codefendants’ sentences to see if they were considerably more favorable than Petitioner’s; however, he could not find a meritorious basis for the motion, and he did not want to risk Judge Newman deciding to give Petitioner *more* time, rather than less. App. pp. 107, 121-22. Counsel’s assessment of the strength of the motion based on the record and the likelihood of success in front of the particular plea judge on such a motion were appropriate factors to consider in deciding whether to file the motion.

The PCR court found Counsel’s testimony on this issue credible, likewise determined Counsel had offered a reasonable strategic explanation for his decision not to file the motion, and denied relief. App. p. 143. “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Further, on review, this Court “gives great deference to a PCR judge’s findings where matters of credibility are involved.” Simuel, 390 S.C. at 270, 701 S.E.2d at 739. 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 Counsel was not deficient in any way, nor was Petitioner prejudiced by his 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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