

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Edgefield County
The Honorable Thomas A. Russo, Plea Judge
The Honorable J. Derham Cole, Post-Conviction Relief Judge

Appellate Case No. 2020-000965

FREDERICK DALE HARVEY, Jr.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUE

Did the post-conviction relief court properly deny relief for the allegation that the State committed prosecutorial misconduct for failing to disclose evidence of Victim's intoxication when there was no evidence the State suppressed Victim's toxicology report? And even if evidence of Victim's intoxication had been suppressed, was there any evidence to suggest Petitioner would have proceeded to trial if he had known about Victim's intoxication?

STATEMENT OF THE CASE

Petitioner Frederick Dale Harvey, Jr. is presently confined in the South Carolina Department of Corrections following his guilty plea in Edgefield County. In the early morning hours of August 19, 2012, law enforcement was dispatched to Stevie T's bar in Edgefield County in response to a shooting. (App. 15). Law enforcement located the body of Marshall Butler lying on the floor (Victim). (App. 16). Victim suffered two gunshot wounds to his head. (App. 19). Witnesses to the shooting described the shooter as wearing a fedora hat and white clothes. (App. 17). Law enforcement located a woman named Tamekia Miller in Aiken County and interviewed her. (App. 17, 65). Miller initially denied seeing the shooting, but later acknowledged her boyfriend (Petitioner) shot Victim after Victim continued to sexually harass her. (App. 17-19). Miller also stated Victim punched Petitioner after Petitioner asked Victim to stop harassing Miller. (App. 18). Victim was extremely intoxicated. A post-mortem toxicology report revealed Victim's blood alcohol level was approximately .30. (App. 18-19, Court's Exhibit #1).

During its October 2012 term, the Edgefield County Grand Jury indicted Petitioner for murder. (App. 351-52). W. Greg Seigler, Esquire¹ represented Petitioner and Assistant Solicitor Henry Franklin Young of the Eleventh Circuit Solicitor's Office represented the State.

On August 14, 2013, Petitioner appeared in the Edgefield County Court of General Sessions before the Honorable Thomas A. Russo and pled guilty to voluntary manslaughter pursuant to North Carolina v. Alford². The State recommended a sentence with a cap of twenty-five years. (App. 5). Judge Russo sentenced Petitioner to twenty-five years' imprisonment. (App. 39).

¹ The Honorable W. Greg Seigler is now a Family Court Judge for the 11th circuit.

² 400 U.S. 25 (1970).

Petitioner did not appeal his sentence. (App. 57). On March 19, 2014, Petitioner filed an application for post-conviction relief (2014-CP-19-085), alleging three grounds for relief. Petitioner alleged that plea counsel was ineffective for: (1) failure to investigate the case; (2) failure to review discovery with Petitioner, and (3) failure to interview potential witnesses. (App. 48). On April 29, 2014 Respondent filed a return and requested an evidentiary hearing on the application. (App. 49-52). An evidentiary hearing into the matter convened on February 21, 2018 before the Honorable J. Derham Cole, circuit court judge. Petitioner was present alongside counsel, Aimee Zmroczek, Esquire. Assistant Attorney General Susannah Cole and Senior Assistant Deputy Attorney General Melody Brown represented the State. At the beginning of the evidentiary hearing, Petitioner amended his application to add a claim of prosecutorial misconduct. (App. 58).

Petitioner testified on his own behalf and the State presented testimony from Assistant Solicitor Young. Because of scheduling difficulties, plea counsel provided testimony via a deposition on February 13, 2018. (App. 57, 127-29). During her cross examination of Assistant Solicitor Young, PCR counsel asked Young for a copy of a toxicology report on Victim. (App. 110). Petitioner claimed to have never received a copy of the toxicology report and asked Judge Cole to continue the evidentiary hearing until Petitioner could ensure she obtained all requested discovery items. (App. 110-25). Judge Cole ruled Young's testimony would be completed by deposition after all discovery was obtained. (App. 123-24). Young subsequently completed his testimony via deposition on August 3, 2018. (App. 170).

On May 22, 2020, Judge Cole issued a written order denying the application in full. Petitioner filed his notice of appeal to this Court on July 7, 2020. On appeal, Petitioner

challenges the denial of relief for his claim that the State committed prosecutorial misconduct in failing to disclose evidence of Victim's blood alcohol level.

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief 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); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (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. Smalls, 422 S.C. 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

The post-conviction relief court properly denied relief for the allegation that the State committed prosecutorial misconduct for failing to disclose evidence of Victim's intoxication because there is no evidence the State suppressed Victim's toxicology report. And even if evidence of Victim's intoxication had been suppressed, there is no evidence to suggest Petitioner would have proceeded to trial if he had known about Victim's intoxication.

Petitioner claims the post-conviction relief court erred in denying him relief because the State committed prosecutorial misconduct by failing to disclose evidence of Victim's blood alcohol level. Because of the State's failure to disclose evidence, Petitioner contends his Alford plea was involuntarily made. Petitioner's argument fails for two reasons. First, the State did not withhold evidence of Victim's blood alcohol content from Petitioner. Petitioner was well aware of Victim's level of intoxication as evidenced by the State's explicit discussion of Victim's intoxication during the plea. Second, even if Petitioner had not been aware of Victim's intoxication, there is no evidence in the record to support a finding that Petitioner would not have pled guilty and instead would have proceeded to trial if he had known of Victim's intoxication. Petitioner never testified that Victim's level of intoxication played any role in his decision to plead guilty rather than proceeding to trial. This Court should deny certiorari.

Petitioner, like all other criminal defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "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, 466 U.S. 668. First, Petitioner must prove that 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"A guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'" Boykin v. Alabama, 395 U.S. 238, 242 (1969). This is because "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full

understanding of the consequences of his plea and the charges against him. Boykin, 395 U.S. at 244.

However, “[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, 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)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see 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”).

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel’s advice was not within the range of competence demanded of attorneys in criminal cases. Lockhart, 474 U.S. at 56. A defendant needs to show (1) counsel’s representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pled guilty and would have insisted in going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)(citing Hill, 474 U.S. 52, 106 S.Ct. 366).

“A Brady³ violation occurs when the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant’s guilt or punishment.” State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020).

³ Brady v. Maryland, 373 U.S. 83 (1963).

Here, Petitioner claims the State withheld evidence of Victim's blood alcohol level from Petitioner in violation of Brady v. Maryland. Accordingly, Petitioner argues his guilty plea was involuntarily made because he was unaware of Victim's level of intoxication. However, there is no evidence in the record to support Petitioner's contention that the State withheld evidence of Victim's level of intoxication. In fact, the record plainly shows the State was open and forthright about Victim's level of intoxication and that Petitioner and plea counsel were well aware of this fact. At the plea hearing, the solicitor made the following remark during the State's recitation of facts: "[Victim] was extremely intoxicated. And, in fact, Your Honor, the toxicology reports verified ocular fluid was 3-0. It was two something, very high." (App. 18, lines 23-25 – App. 19, line 1). Victim's toxicology report revealed his blood alcohol level as .294, which was nearly identical to the solicitor's recitation of facts at the plea. (Court's Exhibit #1). Neither Petitioner nor plea counsel expressed surprise or concern upon hearing the State's acknowledgement of Victim's blood alcohol level. In fact, Petitioner acknowledged he understood the aforementioned evidence would have been presented to a jury if his case had gone to trial. (App. 21). Furthermore, at the PCR hearing and in his deposition Assistant Solicitor Young testified he spoke with plea counsel about Victim's blood alcohol level and made him a copy of the toxicology report. (App. 96-98, 182). Plea counsel could not remember whether he was given a copy of the toxicology report, but he testified if he was aware of a problem with the solicitor's recitation of facts, he would have addressed it. (App. 160-61). However, Petitioner explicitly acknowledged that the solicitor told the plea judge about Victim's extreme intoxication, but denied remembering the solicitor saying anything about Victim's specific level of blood alcohol content. (App. 86-87).

In order to prove a Brady violation occurred, Petitioner must prove that favorable evidence was suppressed by the prosecution. Here, while the evidence may have been favorable to Petitioner, it was not suppressed by the prosecution. All evidence in the record indicates Petitioner and his plea counsel were well aware of Victim's level of intoxication. The solicitor openly acknowledged Victim was intoxicated and even recited Victim's approximate blood alcohol level in his recitation of the facts. (App. 18-19). Furthermore, the solicitor subsequently testified during the PCR hearing that he shared the toxicology report with plea counsel. (96-98, 182). Finally, Petitioner recalled hearing the solicitor tell the plea judge about Victim's intoxication. (App. 86-87). Because the evidence of Victim's intoxication was not suppressed by the prosecution, the PCR judge properly held that Petitioner failed to meet his burden in proving prosecutorial misconduct.

Even if we assume, for the sake of argument, that the State withheld evidence of Victim's intoxication from Petitioner, Petitioner's argument still fails because there is no evidence in the record that Petitioner would have insisted on going to trial rather than pleading guilty if he had known of the intoxication. Throughout Petitioner's testimony during the PCR hearing he never once said he would have gone to trial if he had known about Victim's level of intoxication. (App. 60-89). In fact, the State specifically asked Petitioner about Victim's level of intoxication on cross examination. Petitioner acknowledged hearing the solicitor tell the plea judge that Victim was extremely intoxicated. (App. 86-87). While Petitioner denied hearing the solicitor tell the trial judge what Victim's specific blood alcohol level was, Petitioner never testified that he was unaware that Victim was intoxicated or that Victim's level of intoxication made any difference in his decision to plead guilty rather than proceed to trial. Because there is no evidence in the record to support Petitioner's claim, the PCR judge did not err in denying Petitioner relief for his

prosecutorial misconduct claim. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner freely entered into a plea after being effectively represented by counsel, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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